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82-1823

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST COAST MEDIA, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case involves the Federal Communications Commission's denial of the renewal of license for Station KDIG(FM), San Diego, California, for failure to meet its previously proposed levels of non-entertainment programming. This is the very first time that the Federal Communications Commission has ever denied a broadcaster's renewal of license for such a programming failure alone.

The questions presented are:

1. May the FCC impose its most severe sanction, denial of renewal of license, without explaining why a lesser sanction would not suffice?

2. May the FCC reverse twenty years of consistent precedent in similar cases without explaining its reasoning in doing so?

3. May the FCC, consistent with administrative and constitutional standards of due process, make findings that a licensee made misrepresentations to it without giving the licensee notice and an opportunity to present evidence on those charges?

LIST OF PARTIES

Parties to the proceeding in the Court of Appeals for the District of Columbia Circuit for which review is requested were West Coast Media, Inc.;* the Federal Communications Commission; John B. Musselman; and Jonathan D. Lewis.

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* West Coast Media, Inc. has no parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner West Coast Media, Inc. ("WCM") requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that Court in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals, which affirmed the action of the Federal Communications Commission ("FCC" or "Commission"), is reported at 695 F.2d 617 (D.C. Cir. 1982) and appears at Appendix A, pp. 1a-12a, to this Petition. The *Initial Decision* of the FCC's Administrative Law Judge ("ALJ") renewing KDIG's license for a short term is reported at 79 FCC 2d 625 (1978) and appears at Appendix B, pp. 13a-45a, to this Petition. The FCC's *Decision* denying the renewal of license of Station KDIG (hereinafter referred to as "*Decision*"), reported at 79 FCC 2d 610 (1980), appears at

Appendix C, pp. 46a-68a, to this Petition. The FCC's *Memorandum Opinion and Order* (hereinafter referred to as "*Reconsideration Decision*") denying reconsideration of its previous *Decision* is reported at 86 FCC 2d 331 (1981) and appears at Appendix D, pp. 69a-79a, to this Petition. Other relevant decisions below are: *Memorandum Opinion and Order and Notice of Apparent Liability*, 61 FCC 2d 577 (1976), which appears at Appendix E, pp. 80a-96a, to this Petition; and *Memorandum Opinion and Order*, FCC 77M-1128, released June 24, 1977, which appears at Appendix F, pp. 97a-100a, to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia sought to be reviewed was filed and entered on December 7, 1982.[1] A timely petition for rehearing of the Court's decision filed by WCM was denied on February 7, 1983.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Appendix I, pp. 104a *et seq.*, to this Petition contains the texts of the following statutes:

(1) Section 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a) and (e);

(2) Section 5(b) of the Administrative Procedure Act of 1946, 5 U.S.C. § 554(b);

(3) Section 10(e) of the Administrative Procedure Act of 1946, 5 U.S.C. § 706(2);

(4) Sections 203(c), (e) and (f) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(c), (e) and (f);

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[1] A copy of the judgment sought to be reviewed appears at Appendix G, pp. 101a-102a, to this Petition.

[2] A copy of the Order denying rehearing appears at Appendix H, p. 103a, to this Petition.

(5) Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b); and

(6) Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-9(b).

STATEMENT OF THE CASE

Preliminary Statement

This case was precipitated by the FCC's denial of renewal of license for Station KDIG, San Diego, California on the sole ground that the station had failed to meet its prior programming promises. This is the first time the FCC has ever denied a broadcaster's license renewal for a promise-versus-performance shortfall alone. In doing so, the FCC did not explain its departure from all previous precedent in such cases. The Commission also failed to explain why a lesser sanction would not suffice. Finally, despite the absence of an appropriate issue, the FCC's Decision was permeated by findings that the licensee made misrepresentations before the agency. Thus, this case involves two key issues: first, the FCC's explanatory burden when, as here, it imposes a sanction unprecedented in its severity in similar cases; and second, the agency's authority to make pivotal findings about a licensee's character without affording the licensee notice and an opportunity to be heard on that issue.

Background

WCM, incorporated in 1970 by a group of business people with no broadcast experience, acquired Station KDIG in 1971. Almost immediately WCM encountered severe financial problems. *Initial Decision*, ¶¶ 3-10. As part of a salvation plan for the station, on December 23, 1971, WCM amended the station's pending 1971 renewal application to propose a reduction in non-entertainment programming to 1.1% of its broadcast week. The Commission accepted the reduction on July 25, 1972. *Initial*

Decision, ¶¶ 12-13. Operating, however, out of a studio/office fashioned out of two motel rooms and beset by an unending stream of physical, technical, staffing and financial problems, WCM was unable to carry out even this reduced proposal. *Initial Decision*, ¶¶ 15-20, 33.

In 1976, in response to a petition to deny KDIG's 1974 application for renewal of license, the Commission designated that application for hearing on a number of issues, including whether "West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal as set forth in its 1971 application for renewal . . . ." *Memorandum Opinion and Order and Notice of Apparent Liability*, 61 FCC 2d 577, 585 (1976).[3] Despite the urgings of petitioners to deny that WCM had misrepresented to the Commission in a number of areas, the FCC's Chief Administrative Law Judge, who presided over the case, refused to enlarge the issues to inquire whether WCM had been guilty of misrepresentation, concluding that the Commission had "made a reasoned decision not to include a misrepresentation issue" in issuing its designation order in this case. *Memorandum Opinion and Order*, FCC 77M-1128, released June 24, 1977. After hearings in this case, the ALJ issued his *Initial Decision*, finding that WCM had failed to meet its 1971 program promises. Nonetheless, the ALJ granted KDIG's renewal for a short term,[4] based

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[3] In Commission parlance, this is a "promise-versus-performance" case. "Promise-versus-performance" is a Commission-created term which refers to those cases in which it is charged that the licensee failed to broadcast the non-entertainment programming which it proposed at the beginning of its license term. *See, e.g., Rust Craft Broadcasting of New York, Inc.*, 54 FCC 2d 1222, 1230 (1975).

[4] A short-term renewal grant is an administrative sanction which renews a station's license for a period less than the statutory term. It is used, as the ALJ noted here, "in order that the Commission may review the station's performance promptly and take such actions as circumstances may dictate." *Initial Decision*, ¶ 68. The short term renewal has often been imposed in promise-versus-

on his conclusions that WCM's errors resulted from inexperience and, therefore, that "in this instance, the past is [not] a reliable guide to the future." *Initial Decision*, ¶ 66.

On August 25, 1980, the Commission reversed its Chief Administrative Law Judge and denied renewal of KDIG's license. Noting that its review of programming performance in promise-versus-performance cases is confined "to a determination of whether the licensee made reasonable and good faith efforts to effectuate its proposal,"[5] the Commission concluded that WCM's efforts had not met that standard.[6] Not content to end its inquiry there, however, the Commission also found that WCM made its 1971 program proposals with no intent of carrying them out,[7] in effect finding that WCM had misrepresented to the Commission in making those proposals. Moreover, while affirming the ALJ's decision not to enlarge the issues to add a misrepresentation issue,[8] the Commission noted paradoxically that "[a]ppropriate findings and conclusions

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performance cases to permit an early review of a licensee's post-term non-entertainment programming. *See, e.g., WSER, Inc.*, 29 FCC 2d 441 (1971); *KORD, Inc.*, 31 FCC 85 (1961).

[5] *Decision*, ¶ 15.

[6] While acknowledging that WCM had suffered severe financial problems, the Commission declined to excuse KDIG's programming shortfall on that ground, alleging that WCM had failed to make a "station-specific" showing of financial distress for KDIG. Essentially, the Commission found that WCM had made a "stepchild" out of KDIG, depriving it of facilities and resources, and disproportionately allocating its available resources to a commonly-owned station. *Decision*, ¶¶ 31-33 & n.39.

[7] The Commission found that "the licensee made initial [program] proposals to the Commission which it did not then intend to effect," and that WCM principal Donald B. McCann "did not intend to fulfill the [1971] programming promises when they were made." *Decision*, ¶¶ 33,36.

[8] *Decision*, ¶ 39.

relating to licensee candor could and should have been made with regard to evidence which surfaced in the hearing processes" respecting the June 1974 program logs submitted by WCM as part of its 1974 renewal application. *Decision*, ¶ 40.

Finally, the Commission rejected the ALJ's reasoning in ordering a short-term renewal grant. It dismissed as a "generalized personal assessment, . . . not material to the . . . promise versus performance issue" the ALJ's conclusion that WCM's principals are "honorable men," whose past failings had resulted from inexperience and thus were not indicative of WCM's future performance.[9] The Commission denied KDIG's renewal, citing as justification only two cases—*WMOZ, Inc.*, 36 FCC 202 (1964) and *Leflore Broadcasting Co., Inc.*, 65 FCC 2d 556 (1977), *affirmed sub nom, Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980)[10]—both of which involved licensee misrepresentation. Neither in its *Decision* nor on reconsideration did the Commission explain its divergence from all precedent in promise-versus-performance cases in denying KDIG's renewal.

On appeal of the Commission's denial of its license renewal to the United States Court of Appeals for the District of Columbia Circuit,[11] WCM argued, *inter alia*, that the Commission had: (1) violated due process by making findings that WCM had misrepresented without giving WCM notice and an opportunity to respond to those charges; (2) imposed its harshest sanction without furnishing the compelling justification required by *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed*, 450 U.S.

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[9] *Decision*, ¶ 35.

[10] *Decision*, ¶ 36.

[11] The Court of Appeals' jurisdiction was invoked under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b).

91 (1981), *rehearing denied*, 451 U.S. 933 (1981);[12] and (3) failed to explain its departure from consistent precedent in promise-versus-performance cases.

In a brief and cryptic opinion, the Court of Appeals rejected these arguments. While acknowledging that the Commission's findings regarding WCM's intent were "imprudent" and "should not [have been] discussed by the Commission in the absence of a designated misrepresentation issue," the Court held that no due process violation had occurred because WCM had not been "harmed by lack of notice."[13] Further, while conceding that "[t]his case is apparently the first time a license renewal has been denied solely because of a promise-versus-performance failure," the Court held that the Commission was not required to meet the *Steadman* requirement to furnish compelling justification for its use of its most severe sanction "because of differences in the regulatory schemes at issue." 695 F.2d at 621-22.[14] Finally, the Court held that the FCC was not required to explain its deviation from past precedent in denying KDIG's renewal because of its broad discretion in fashioning sanctions.

WCM timely petitioned for rehearing of the Court of Appeals' decision. Rehearing was denied on February 7, 1983, and this petition for certiorari followed.

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[12] *Steadman* requires an agency imposing similarly severe sanctions upon an applicant or licensee to explain why a lesser sanction would not suffice to serve the agency's statutory goals. *See* text at notes 24-29 *infra*.

[13] The Court also noted that the Commission had denied, in its *Reconsideration Decision*, that it had made findings of misrepresentation. 695 F.2d at 619-20.

[14] *Steadman* involved the debarment by the Securities and Exchange Commission ("SEC") of an investment adviser.

REASONS FOR GRANTING THE WRIT

I. The Court's Decision Creates Uncertainty as to an Agency's Explanatory Burden When It Deviates From Its Prior Precedent In Imposing a Sanction, an Important Question Which Should be Settled by This Court.

This case represents a watershed in FCC history. Ever-sensitive to the First Amendment concerns which inhere in the subject matter it regulates,[15] the FCC has never before denied license renewal for programming failures alone. Indeed, the Commission has here departed from over twenty years of consistent precedent in promise-versus-performance cases, in which, absent accompanying affirmative licensee malfeasance, prospective sanctions have always been employed.[16] The Court of Appeals itself acknowledged that this "is apparently the first time a [Federal Communications Commission] license

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[15] As the Commission itself noted in its Brief to the Court, pp. 6-7, in *Committee for Community Access, et al. v. FCC*, Case Nos. 82-2314, 82-2373, 82-2400 (D.C. Circuit):

> First Amendment and other policy considerations favor giving deference to a broadcaster's discretion in the sensitive area of programming, and have led [the D.C. Circuit] to remind the Commission that it must walk a 'tight rope between saying too much and saying too little' and 'avoid pervasive supervision' of programming content. *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[16] *See, e.g., Federal Broadcasting System*, 75 FCC 2d 615 (1980) (renewal granted to permit distress sale); *Associated Communications Corp.*, 71 FCC 2d 1353 (1979) (renewal granted; reporting conditions imposed); *Hubbard Broadcasting, Inc.*, 41 Rad. Reg. 2d (P&F) 979 (1977) (short-term renewal grant); *Rust Craft Broadcasting of New York, Inc.*, 54 FCC 2d 1222 (1975) (short-term renewal granted); *Palmetto Radio Corp.*, 58 FCC 2d 1104 (1976) (renewal granted); *WSER, Inc.*, 29 FCC 2d 441 (1971) (short-term renewal granted); *Loudon County Broadcasting Co.*, 4 FCC 2d 188, *recon. denied*, 5 FCC 2d 13 (1966); *KORD, Inc.*, 31 FCC 85 (1961) (short-term renewal granted).

renewal has been denied solely because of a promise-versus-performance failure." [17]

It is well-settled that an agency has broad discretion in imposing a sanction and is not required "to deal with all cases at all times as it has dealt with some that seem comparable." *FCC v. WOKO, Inc.*, 329 U.S. 223, 228 (1946). *Accord, Butz v. Glover Livestock Commission Co., Inc.*, 411 U.S. 182, 187 (1973). Yet, it is also beyond dispute that an agency *must explain* any such deviation from prior precedent in order to facilitate judicial review of its decision.[18] Thus, where the agency departs from its prior precedent, the court must be satisfied *"that the agency was aware it was changing its views and has articulated permissible reasons for that change*, and also that the new position is consistent with the law." *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982) (emphasis

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[17] 695 F.2d at 621.

[18] *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973); *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954); *Hatch v. FERC*, 654 F.2d 825, 833-35 (D.C. Cir. 1981); *Doubleday Broadcasting Company, Inc. v. FCC*, 655 F.2d 417, 423 (D.C. Cir. 1981); *Communications Investment Corp. v. FCC*, 641 F.2d 954, 976-77 (D.C. Cir. 1981); *White Mountain Broadcasting Co., Inc. v. FCC*, 598 F.2d 274, 278-79 (D.C. Cir.), *cert. denied*, 444 U.S. 963 (1979) (explanation not required only when reason for departure is so obvious as to remove the need for explanation); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("[t]his Court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971); FTC v. Crowther, 430 F.2d 510, 514 (D.C. Cir. 1970); *Greater Boston Television Corporation v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Herbert Harvey, Inc. v. NLRB*, 385 F.2d 684 (D.C. Cir. 1967); *Burinskas v. NLRB*, 357 F.2d 822, 827 & n.5 (D.C. Cir. 1966); *City of Lawrence v. CAB*, 343 F.2d 583, 588-89 (1st Cir. 1965); *see Public Media Center v. FCC*, 587 F.2d 1322, 1331-32 (D.C. Cir. 1978); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

added). *Accord, Columbia Broadcasting System, Inc. v.* FCC, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971).

The Commission's *Decision* did not discuss, acknowledge, or, indeed, show any awareness of, the unprecedented nature of its action. Nowhere in the *Decision* is there any explanation for the departure from twenty years of consistent treatment of promise-versus-performance cases. The subject is not addressed even on reconsideration, after WCM had pointed out to the Commission the unprecedented nature of its action.[19]

The Court of Appeals admitted that this case involved the application of an unprecedented sanction,[20] and paid brief obeisance to the principle that an agency must acknowledge and explain its deviation from past precedent.[21] However, in affirming the FCC's denial of KDIG's renewal, the Court *totally ignored* the FCC's failure to explain its departure from precedent in imposing that sanction here, emphasizing instead the FCC's broad discretion to choose appropriate sanctions. 695 F.2d at 622, *citing FCC v. WOKO, Inc.*, 329 U.S. 223, 228-29 (1946); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied sub. nom. WWIZ, Inc. v. FCC*, 383 U.S. 967 (1966).

The FCC's discretion to select the sanction it imposed here has never been challenged by WCM, and it is simply not in issue. It is only the agency's failure to *explain* its decision to reject reasoning which it had followed consistently for twenty years which necessitates this Court's

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[19] *See* Petition for Reconsideration of West Coast Media, Inc., p. 21. In fact, on reconsideration the Commission expressly declined to explain its departure from prior precedent, resting simply on its "broad discretion" to select sanctions in renewal proceedings. *Reconsideration Decision*, ¶ 12.

[20] 695 F.2d at 621.

[21] 695 F.2d at 620-21.

review.[22] In the absence of such an explanation, an applicant cannot proceed before an agency in the informed and rational manner which we demand as minimal administrative due process. *See, McHenry v. Bond*, 668 F.2d 1185, 1192 (11th Cir. 1982); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978). Moreover, no reviewing court can be satisfied that the agency did not act arbitrarily or discriminatorily. And most seriously, failure to require an agency explanation here would result in unfettered and unjustified agency action. Courts have always required more:

> expert discretion is secured, not crippled, by the requirements for . . . reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion.'[23]

II. An Agency May Not Impose Its Most Severe Sanction Without Explaining Why A Lesser Sanction Would Not Suffice.

In *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed on other grounds*, 450 U.S. 91 (1981), the Fifth Circuit Court of Appeals held that the Securities and Exchange Commission could not impose its most severe sanction—permanent debarment—without furnishing compelling justification and explaining why a lesser sanction would not suffice. The Commission's imposition here of its ultimate sanction triggered a duty to furnish the explanation required by *Steadman*.[24] The Commission

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[22] The FCC's discretion in dealing with licensees "does not eliminate [its] burden to express clearly the basis of its action." *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980).

[23] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), *quoting, Burlington Truck Lines v. United States*, 371 U.S. 156, 157 (1962).

[24] In addition, compelling justification was required in this case because the Commission's unprecedented action denying WCM's

plainly failed to explain why a lesser sanction would not suffice, but the Court excused this omission, holding that *Steadman* does not apply to the FCC "because of differences in the regulatory schemes at issue." Unlike the SEC, which debars a respondent as a punitive measure, the Court reasoned, the "FCC is required to make an affirmative finding that the public interest will be served by granting the license." 695 F.2d at 622.

The Court of Appeals' attempt to confine *Steadman* to the statutes administered by the SEC is untenable. The SEC and the FCC operate under similar statutory mandates. Both agencies must consider the public interest in granting or denying licenses.[25] Moreover, the SEC does not revoke a license as a punitive measure but rather only on a finding that the public interest will be served

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renewal of license on programming grounds alone raises serious First Amendment concerns:

> When the right to continue to operate a lucrative broadcast facility turns on periodic government approval of the *type* of broadcasting done, the right of the media to be free from government control over the content of speech is in constant jeopardy. (Emphasis in original.)

Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d 454, 457 (D.C. Cir. 1980).

[25] The FCC must consider the public interest before granting a license. See Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a). Similarly, the SEC must consider the public interest before it can initially register investment advisors and broker-dealers. To be licensed, both investment advisors and broker-dealers must complete an application for registration containing such information as the SEC finds necessary or appropriate in the public interest. The SEC must grant registration if it finds that the requirements of the section on registration have been complied with and must deny registration if it cannot make such a finding or if it finds that the public interest would require revocation or suspension of the permitted registration. *See* Sections 203(c) and (e) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(c) and (e); Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b).

thereby.[26] Indeed, in *Steadman*, the Fifth Circuit itself noted this fact and re-emphasized both the "prophylactic purpose of the securities laws" and the SEC's duty to consider the " 'public interest' . . . in fashioning its orders. . . ." *Steadman v. SEC*, *supra*, 603 F.2d at 1142.[27]

Ultimately, however, whether or not the SEC and the FCC administer different regulatory schemes is beside the point. The *Steadman* requirement that an agency furnish compelling justification for its use of its most "potent weapon" [28] is not based on any of the regulatory statutes administered by the SEC but rather on the Court's duty, under the Administrative Procedure Act, to set aside

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[26] *See* Section 15(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(b)(4); Section 9(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-9(b); Sections 203(e), and (f) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(e) and (f); *Decker v. Securities & Exchange Commission*, 631 F.2d 1380 (10th Cir. 1980); *Beck v. SEC*, 413 F.2d 832 (6th Cir. 1969), *on later appeal*, 430 F.2d 673, 674 (6th Cir. 1970); *Blaise D'Antoni & Associates, Inc. v. SEC*, 289 F.2d 276, 277 (5th Cir. 1961), *cert. denied*, 368 U.S. 899 (1961); *Shuck v. SEC*, 264 F.2d 358 (D.C. Cir. 1958); *Nassar & Co.*, CCH Federal Securities Law Reports, ¶ 81,904, p. 81,120 (SEC 1978); *Underhill Securities Corporation*, 42 SEC 689, 695 (1965). And, to the extent that there is a penal element in the SEC's revocation proceedings because the consequences to the licensee are severe, it is also clear that there is a penal element in the FCC's denial of renewal. In both cases, the agency is putting the licensee out of business. In fact, while the Court of Appeals denied that the FCC's denial of a license renewal is a penalty, in the very next breath, it referred to the denial as a "sanction to apply to licensee misconduct." 695 F.2d at 622.

[27] While this Court and the Fifth Circuit referred to the proceedings involved in *Steadman* as "disciplinary" proceedings, *Steadman v. SEC*, *supra*, 603 F.2d at 1139; *Steadman v. SEC*, *supra*, 450 U.S. at 92, it is clear that the statutes at issue in *Steadman* call for the SEC to censure, suspend or debar respondents only on a finding that the public interest will be served thereby, not as a punitive measure. *See* note 26 *supra*.

[28] *Steadman v. SEC*, *supra*, 603 F.2d at 1139.

agency action found to be arbitrary or capricious. As the *Steadman* Court noted:

> We are empowered to set aside Commission orders that are arbitrary and capricious. 5 U.S.C. § 551, 702, 706 (1976). We subscribe to the common-sense notion that the greater the sanction the Commission decides to impose, the greater is its burden of justification.

Steadman v. SEC, supra, 603 F.2d at 1139. Since the same standard of judicial review under the Administrative Procedure Act was applied both to the FCC order at issue in this proceeding and to the SEC order involved in *Steadman*, the explanatory burden imposed by *Steadman* clearly applied to the FCC's action in this case.

The Court of Appeals' refusal to apply *Steadman* to the FCC is a serious error. As noted above, courts require agency explanations to guard against arbitrary and irrational decision-making. When an agency, whether it be the SEC, the FCC, or some other federal agency, imposes its most severe sanction on a respondent, the courts must be especially vigilant to insure that the agency decision is the product of reasoned decision-making, for the stakes are high.[29] The FCC, no less than the SEC, must meet this higher explanatory burden.

III. The FCC's Wide Departure From Standards of Due Process, Sanctioned by the Court of Appeals, Requires an Exercise of this Court's Power Of Supervision.

As the Court of Appeals acknowledged, "The Communications Act [Section 309(e)], the Administrative Procedure Act [Section 554(3)(b)] and the due process clause require the FCC to designate the issues to be

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[29] The sanction here has drastic consequences. It puts a broadcaster out of business.

considered in a renewal hearing." 695 F.2d at 619.[30] The agency is required to designate the issues in order to provide the licensee fair notice of the charges brought against it and an opportunity to respond to those charges. *Id.* In this case, the FCC utterly betrayed its obligation to afford WCM due process by making key findings of misrepresentation without first designating a misrepresentation issue.

Clearly, the Commission's findings went beyond those encompassed by the promise-versus-performance issue. Under a promise-versus-performance issue, the Commission examines the *bona fides* and reasonableness of a licensee's efforts to carry out its programming promises. *See KORD, Inc.*, 31 FCC 85 (1961). The promise-versus-performance issue designated in this case should have focused on "whether West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal. . . ." 61 FCC 2d 577, 585 (1976). Instead of examining WCM's programming performance, however, the FCC focused on its motives and intent.

The Commission found that WCM had made its programming promises to the Commission with no intent to keep them. *Decision*, ¶¶ 19, 23, 33, 35 n.45, 36. This is clearly a finding of misrepresentation, not of promise-versus-performance failure: finding that a licensee "*never intended* to fulfill [its] programming promises necessarily entails the corollary finding that [it]

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[30] *See Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *RKO General, Inc. v. FCC*, 670 F.2d 215, 224-25, 235-37 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), 102 S.Ct. 2931 (1982); *Bendix Corporation v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861-62 (2nd Cir. 1966); *NLRB v. Tennsco Corp.*, 339 F.2d 396, 399-400 (6th Cir. 1964).

intended to deceive the Commission,"[31] and intent to deceive the Commission in making a representation is "a *sine qua non* of a misrepresentation issue." *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980), *quoting CBS, Inc.*, 49 FCC 2d 1214, 1223 (1974). Moreover, the Commission made findings of misrepresentation with respect to the 1974 KDIG renewal application. The ALJ found the application to be "inherently misleading," *Initial Decision*, ¶ 50, and the Commission concluded that "[a]ppropriate findings and conclusions relating to licensee candor could and should have been made" regarding that application. *Decision*, ¶ 40. Most significantly, the Commission made these findings of misrepresentation without affording WCM any opportunity to present evidence that it had not misrepresented.

The Court of Appeals acknowledged that the Commission's findings concerning WCM's state of mind in making its programming proposals were "imprudent," noting that "[s]uch intentions should not be discussed by the Commission in the absence of a designated misrepresentation issue," because a licensee's "intention not to meet [its programming proposals] closely resembles an intent to deceive the FCC, which is at the heart of misrepresentation cases." 695 F.2d at 620. Nonetheless, the Court refused to remand the case to the FCC because it held that WCM had neither been deprived of notice nor harmed by the lack of notice. With due respect to the Court of Appeals, this conclusion is flabbergasting. Findings of misrepresentation permeated the *Decision*, appearing there *six times*.[32] Clearly, the result in this

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[31] (Emphasis in original) *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

[32] *See Decision*, ¶¶ 19, 23, 33, 35 n.45, 36, 40. In the face of these repeated findings, the Commission's conclusory denial, on reconsideration, that it had made findings of misrepresentation, a denial relied on by the Court of Appeals in rejecting WCM's claim of a due process violation, 695 F.2d at 620, merits no credence.

case is inextricably linked to these impermissible findings. In justifying its decision to deny renewal in this case, the Commission cited just two cases: *both were misrepresentation cases.*[33] Moreover, while broadcast licenses have *never before* been denied solely for a promise-versus-performance failure,[34] they have consistently been denied for licensee misrepresentation.[35]

WCM never had notice or an opportunity to address the questions raised concerning its intent at the time it made its 1971 program proposals or at the time it submitted its 1974 renewal application.[36] And that deprivation is at the heart of this due process violation,

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[33] *See Decision*, ¶ 36, *citing WMOZ, Inc.*, 36 FCC 202 (1964), and *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980).

[34] *See* n.16 *supra*.

[35] *See*, e.g., *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Sea Island Broadcasting Corp. of S.C. v. FCC*, 60 FCC 2d 146 (1976), *recon. denied*, 64 FCC 2d 721 (1977), *aff'd*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980); *Leflore Broadcasting Co., Inc. v. FCC*, 65 FCC 2d 556 (1977), *aff'd*, 636 F.2d 454 (D.C. Cir. 1980); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971); *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099 (1978); *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183 (1973); *Radio Broadcasters, Inc.*, 23 FCC 2d 209, *recon. denied*, 25 FCC 2d 450 (1970); *Vinita Broadcasting Co., Inc.*, 30 FCC 2d 458, *recon. denied*, 32 FCC 2d 501 (1971); *WMOZ, Inc.*, 36 FCC 202, *recon. denied*, 36 FCC 1467 (1964), *rev'd and remanded*, 344 F.2d 197 (D.C. Cir. 1965), *aff'd in part*, 3 FCC 2d 637 (1966).

[36] Notice to WCM that the proceeding would focus on its efforts to meet its proposals *after they had been made* in no way constituted notice that its state of mind *at the time it made those proposals* was also at issue. The two issues are clearly different in scope and focus, concerning themselves with two different and discrete time periods. Moreover, the promise-versus-performance issue designated did not afford notice to WCM that its intent in submitting its 1974 renewal application was at issue.

regardless whether or not the result in the case was altered thereby:

> The evil at which the statute [the Administrative Procedure Act, Section 554(b)] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1257 (D.C. Cir. 1968).

Ultimately, there is only one rational explanation for what happened in this case. Though designated as a promise-versus-performance case which would have led, under appropriate FCC precedent, to license renewal with prospective sanctions, the FCC became concerned that misrepresentations had occurred. Without changing the issues in the proceeding, it made misrepresentation findings throughout its *Decision*. It then denied renewal of license, relying exclusively upon misrepresentation precedent and ignoring all prior promise-versus-performance cases.

The FCC may not be permitted to "change theories in midstream without giving respondents reasonable notice of the change . . . ." *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C.Cir. 1968). If it believed that misrepresentation occurred, it was required to designate an appropriate issue and give the licensee an opportunity to adduce evidence in its own behalf. *RKO General, Inc. v. FCC*, *supra*, 670 F.2d at 224-25, 235-37. This Court cannot sanction any lesser due process observance by administrative agencies.

IV. Summary Reversal of the Court of Appeals' Clearly Erroneous Decision Is Warranted.

The decision in this case put a broadcaster completely out of business solely because it did not present enough non-entertainment programming on its station. Although the remedy imposed was unprecedented in its harshness, the FCC did not justify its total disregard of precedent. Nor did the FCC explain why lesser sanctions would not suffice. Moreover, without designating appropriate hearing issues, the FCC found that WCM had misrepresented, findings conceded by the Court of Appeals to be "imprudent".[37] In short, the action taken here was clearly unprecedented, unexplained and effected with little regard for requisite administrative due process.

There is no need for this Court to belabor the factual record in this case. The decision of the Court of Appeals affirming the Commission's action in this case was so fraught with procedural error that summary reversal is warranted.[38] *Atchison, Topeka & Santa Fe Railway Co. v. Board of Trade*, 412 U.S. 800 (1973); *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *affirmed on other grounds*, 450 U.S. 91 (1981); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938).

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[37] Indeed, the injustice is magnified since the Commission made these findings after affirmatively assuring WCM that misrepresentation was *not* at issue. *Memorandum Opinion and Order*, FCC 77M-1128, June 24, 1977.

[38] When confronted with clearly erroneous action below, this Court may summarily reverse to conserve its time and resources. *See* Rule 23 of the Rules of the Supreme Court; *Robert L. Stern and Eugene Gressman, Supreme Court Practice*, p. 362 (5th ed., C.1978). The Court has adopted this procedure frequently. *See, e.g., Johnson v. Virginia*, 373 U.S. 61 (1963); *Rogers v. Calumet National Bank*, 358 U.S. 331 (1959); *Matles v. United States*, 356 U.S. 256 (1958); *Edwards v. United States*, 355 U.S. 36 (1957); *Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949).

CONCLUSION

Petitioner is the first broadcaster ever to lose its license for mere promise-versus-performance shortfalls. Yet, the FCC failed to explain why it departed from its previous precedent in imposing the sanction in this case, or why a lesser sanction would not suffice. Moreover, the Commission's decision was permeated with impermissible findings of misrepresentation, made despite the absence of an appropriate issue at hearing. Despite these serious flaws in the Commission's decision, the Court of Appeals affirmed. If its decision is permitted to stand, it will afford the FCC unfettered discretion to impose sanctions without adequate explanation and to broaden evidentiary hearings to cover potentially decisive issues without adequate notice.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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May 9, 1983

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MAY 9 1983
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CLERK

82-1823

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST COAST MEDIA, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1548

WEST COAST MEDIA, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

JOHN B. MUSSELMAN,
JONATHAN D. LEWIS,
Intervenors

Appeal from an Order of
the Federal Communications Commission

Argued March 16, 1982

Decided December 7, 1982

Eric L. Bernthal, with whom *Mania K. Baghdadi* and *Donald B. McCann* were on the brief, for appellant. *David Tillotson* also entered an appearance for appellant.

L. Andrew Tollin, counsel, Federal Communications Commission, with whom *Stephen A. Sharp*, General Counsel and *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission were on the brief, for appellee.

Anne B. Roberts, with whom *Charles M. Firestone* was on the brief, for intervenors.

Before: MIKVA and GINSBURG, *Circuit Judges* and BAZELON, *Senior Circuit Judge*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

BAZELON, *Senior Circuit Judge*: Appellant West Coast Media (West Coast) appeals the Federal Communication Commission's denial of the license renewal for its radio station. The intervenors are two residents of the station's listening area who initially filed the petition to deny. This appeal follows FCC denial of a petition to deny. This appeal follows FCC denial of a petition for reconsideration, in which the FCC rejected the arguments now before this court. We affirm.

BACKGROUND

In 1970, a group of business people with no broadcast experience formed West Coast Media, Inc. ("West Coast"), and purchased an FM radio station in Orange County, California. Roughly six months later, West Coast acquired a second FM station, KDIG in San Diego. Severe financial difficulties beset West Coast almost immediately, and its principal, McCann, decided to infuse large amounts of capital and tighten the operations. Pursuant to the latter goal, West Coast filed an amendment to the pending renewal applications for both stations in December 1971 ("1971 Amendment").

The 1971 Amendment requested relief from the stations' earlier programming promises. McCann described his financial problems and told the Commission that "a substantial reduction (or elimination) of time proposed to be devoted to News, Public Affairs and other [non-entertainment] programs" was necessary to keep the stations viable. Accordingly, McCann made the following promises:

(a) As a temporary matter, KDIG will broadcast only *0%* news, *1.1%* public affairs, and *0%* other non-entertainment programming.

(b) That programming will not be supplied by acquiring tapes from other producers.

(c) Competent personnel will aggressively report and take editorial positions concerning the community's problems.

(d) One staffer will search the community, investigate stories, and prepare three five-minute public affairs programs each day, seven days a week.

(e) "[I]t is intended that *well before* the next license renewal time [KDIG] will be devoting more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs . . . ."

(emphasis added). 79 F.C.C.2d 625, 627-28 (1978). In July 1972, the Commission approved the 1971 Amendment, noting its expectation "that increased programs will be broadcast during the coming renewal period year consistent with the proposal." *Id.*

When West Coast applied for the renewal of KDIG's license in July 1974, two residents of the listening area represented by a public interest group filed a petition to deny with the FCC. In response to that petition, the FCC designated four issues for a hearing: (i) promise-versus-performance, (ii) whether KDIG's non-entertainment programming was responsive to community needs, (iii) some claimed technical violations, and (iv) whether, in light of the other issues, renewal would be in the public interest. 61 F.C.C.2d 577, 585 (1976). The FCC placed the burden of proof on each of these issues on the licensee. The Commission denied a motion by intervenors to enlarge the designated issues to include whether West Coast had made misrepresentations to the FCC.

The ALJ found that: (1) due to KDIG's negligence, the record of its programming over the license term was inadequate to carry the burden of proof on the promise-versus-performance issue (KDIG had lost most of its program logs); (2) even under its own representations, KDIG had fallen substantially short of its program commitments; (3) the station's financial difficulties did not excuse its non-compliance; (4) West Coast failed to carry its burden of proving that its programming responded to community needs; (5) the public interest would not be served by renewal "[i]f further performance is to be surmised solely from past performance." 79 F.C.C.2d 625, 640-645 (1978). The ALJ decided, however, that West Coast would obtain a "short-term" (one year) renewal because its failures resulted from the inexperience of its principals, and in the future such "misjudgments are less likely to occur." *Id.* at 645.

On appeal, the Commission adopted most of the ALJ's findings and conclusions. It concluded, however, "that the record indicates the licensee made initial proposals to the Commission which it did not then intend to effect, that with the passage of time the licensee did not make sincere efforts to carry out its proposals, and that it did not convincingly demonstrate that resources were not available to allocate to non-entertainment." 79 F.C.C.2d 610, 621-22 (1980). The Commission decided that there was "simply no justification to give the inexperienced broadcasters the advantage of performing below minimal renewal standards for a license term without suffering the same consequences that experienced broadcasters would incur." *Id.* at 622. Accordingly, the Commission denied renewal. It also agreed with the ALJ that West Coast had not responded to community needs, but expressly refused to rely on that ground in denying renewal. West Coast submitted a petition for reconsideration which the FCC rejected. 86 F.C.C.2d 331 (1981). Both FCC decisions were unanimous.

Appellant makes three arguments in this appeal. First, appellant contends that the FCC conclusion that West Coast never intended to fulfill its promises constitutes, in essence, a finding that West Coast was guilty of misrepresentation. Because the FCC had not designated misrepresentation as an issue, petitioner claims the FCC deprived it of notice and the opportunity to be heard. Appellant's second claim is that the Commission failed to follow or distinguish its own precedent in two respects: (i) by not accepting West Coast's financial difficulties as an excuse for the company's programming shortfalls and (ii) by not imposing a sanction less severe than license nonrenewal. Finally, petitioner contends the Commission's conclusions regarding West Coast's "good faith" were not supported by substantial evidence.

Discussion

A. *Was West Coast deprived of notice?*

The Communications Act,[1] the Administrative Procedure Act,[2] and the due process clause require the FCC to designate the issues to be considered in a renewal hearing. The purpose of designating issues is to provide a licensee adequate opportunity to rebut charges made against it. West Coast argues that the Commission deprived it of this opportunity in making two conclusions: (i) that West Coast "never intended" to fulfill its 1971 programming promises, and (ii) that certain aspects of KDIG's 1974 renewal application were "inherently misleading." West Coast claims that these conclusions amounted to a finding that the licensee engaged in "misrepresentation" (a specific intent to deceive), which was not a designated issue. We disagree.

The FCC described its inquiry on the promise-versus-performance issue as follows: "To determine whether

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[1] 47 U.S.C. § 309(e) (1976).

[2] 5 U.S.C. § 554(b)(3) (1976).

West Coast Media, Inc., made *reasonable and good faith* efforts to carry out its non-entertainment proposal as set forth in its 1971 application for renewal of license. . . ." 61 F.C.C.2d 577, 585 (emphasis added). Inquiry into a licensee's good faith does not only involve examination of the fruits of the licensee's labors. It may also examine the licensee's efforts, and the conscientiousness of those efforts. *See KORD, Inc.*, 31 F.C.C. 81 (1961); *Rust Communications Group, Inc.*, 53 F.C.C.2d 355 (1975). The latter may be particularly important where the Commission finds a discrepancy between the licensee's promises and its performance, as it did in this case.

In the instant case, however, the FCC examined not only appellant's state of mind in meeting its proposals, but its state of mind in making those proposals as well. It concluded that appellant had no intention of meeting its proposals even at the time they were made. Because those proposals were made for the benefit of the FCC, an intention not to meet them closely resembles an intent to deceive the FCC, which is at the heart of misrepresentation cases. Such intentions should not be discussed by the Commission in the absence of a designated misrepresentation issue. The FCC's reference to appellant's intent when making the programming proposals was imprudent.

Under the circumstances of this case, however, appellant's burden to establish its good faith makes it difficult to see how the FCC's conclusions deprived appellant of notice. Wide discrepancies existed between the licensee's proposals and its performance from the outset.[3] From the very beginning of the period, the licensee failed to "commit the personnel and resources necessary to carry out [the] programming promises,"[4] and offered little evidence of factors that would excuse these shortfalls.[5] In

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[3] 79 F.C.C.2d 610, 618 (1980).

[4] *Id.* at 619.

[5] *Id.* at 619; 79 F.C.C.2d 625, 644.

light of this extremely poor showing, the FCC questioned the licensee's sincerity in making the proposals.

Appellant's claim that he was harmed by lack of notice tries to turn the FCC analysis on its head. The Commision's statement about the licensee's intent were characterizations of the weakness of the licensee's explanation of its programming shortfalls. The FCC's decision in this case does not reflect lack of notice by the licensee: instead, it reflects the licensee's difficulty in explaining egregious discrepancies between programming proposals and efforts to meet them. Although the Commission was imprudent in its language, we cannot agree that appellant was harmed by lack of notice.

On petition for reconsideration, moreover, the FCC explicitly addressed West Coast's concern that the agency found it guilty of misrepresentation. The agency stated:

> To the extent our Decision referred to the licensee's intent, we did not mean to suggest that our inquiry focused on anything but the licensee's reasonable and good faith efforts to adhere to its promises . . . . We underscore that our Decision rested on findings of West Coast's lack of reasonable and good faith efforts to fulfill its commitments, and not on findings of misrespresentation.

86 F.C.C.2d at 334, 335 (footnote omitted). Given this explication, it would serve no purpose to send this case back to the FCC for a clearer statement of the basis of its decision.

B. *FCC precedents.*

Although an agency has flexibility to reexamine its previous holdings, such changes must be rationally and explicitly justified. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 806-09 (1973); *Office of Communication etc. v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977). This requirement ensures "that

the standard is being changed and not ignored, and . . . that [the agency] is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). If a change in policy is explained, however, our review is limited to whether the basis of the change was so unreasonable as to be arbitrary and capricious. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). West Coast contends that the FCC failed to observe or distinguish precedent in two respects: 1) by not excusing West Coast's programming shortfalls in light of its financial difficulties, and 2) by applying the sanction of nonrenewal in the absence of a finding of misrepresentation.

1. *Financial difficulty.*

Petitioner relies heavily on *Hubbard Broadcasting, Inc.*, 41 R.R.2d 979 (1977), to establish a "longstanding" FCC policy that financial difficulties excuse programming shortfalls. That policy, according to petitioner, rests on the FCC's premise that the public interest is served by allowing "infant" stations to reduce non-entertainment programming until their financial position improves.

We cannot agree that *Hubbard* controls this case.[6] More importantly, however, the FCC did not ignore that case. It distinguished that opinion in both its original decision and on petition for reconsideration. Those distinctions were eminently reasonable. Unlike *Hubbard*, the record in this case established that KDIG was losing

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[6] *Hubbard* and the other cases cited by appellant, *Loudon County Broadcasting Co.*, 4 F.C.C. 188, *recon. denied*, 5 F.C.C.2d 13 (1966); *Northwest Broadcasters*, 3 F.C.C.2d 571, 572 (1966), do not establish that programming shortfalls will necessarily be excused if financial difficulties are found. At most, they establish that when good faith efforts are made, and the actual programming is not wholly inadequate, financial difficulties may excuse deviations of programming from proposals. The Commission did not depart from this policy in this case.

money when West Coast acquired it and when it made its programming promises. The programming promises were made in light of and despite those losses. No showing of a dramatic worsening of the financial situation was made.

In addition, the record suggested that KDIG programming suffered because of deliberate neglect by its owners in favor of another station. This situation was absent in *Hubbard*. In light of that evidence, the Commission required that West Coast make a "station-specific" showing that uncontrollable financial problems *at KDIG* justified the programming shortfall.[7] No such proof was provided, partly because of the inadequacy of appellant's own record-keeping. Appellant maintains that overall losses for West Coast should be sufficient. We do not agree. The FCC's licensing scheme requires each station to serve the needs of its city of license. The owners of KDIG disserved the citizens of San Diego while they devoted their resources to a station in a different city. It was reasonable for the FCC to conclude that West Coast could only meet its burden by showing the nature of losses experienced by KDIG as a single entity.[8]

B. *Sanction.*

This case is apparently the first time a license renewal has been denied solely because of a promise-versus-performance failure. Such derelictions in the past have

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[7] In *Hubbard*, the court stated that "[a] review of the financial information discloses a full and open assessment of [the station's] financial condition as it related to its ability to support non-entertainment programming." 41 R.R.2d 987.

[8] The Commission concedes that KDIG may have been losing money throughout the license term. 79 F.C.C.2d 610, at 620 (1980). Without specific data concerning KDIG's financial situation, however, the Commission could not determine the magnitude of those losses, and whether they were the result of irresponsible allocation of resources between the two stations.

been remedied through fines or short-term renewals. West Coast argues that the Commission did not convincingly explain its decision to impose such a severe sanction.

Appellant relies heavily on *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd*, 450 U.S. 91, *rehearing denied*, 10 S.Ct. 2008 (1981). That decision required the SEC to provide compelling justification for its decision to impose "the most potent weapon in the Commission's 'arnesal of flexible enforcement powers.'" *Id.* at 1139. This case differs from *Steadman* because of differences in the regulatory schemes at issue. *Steadman* involved the Commission's decision permanently to bar an investment adviser from further practice of his trade. In FCC license renewal cases, in contrast, the FCC is required to make an affirmative finding that the public interest will be served by granting the license. As Judge Mikva recently explained:

> [There are] emphatic differences between a broadcast applicant before the FCC and one who faces the possibility of punishment. . . . [D]enial of a renewal application "is not a penal measure." . . . . [T]he FCC's purpose is not to punish licensees for past wrongs, but to ensure that these "fiduciaries of a great public resource" will "satisfy the highest standards of character commensurate with the public trust that is reposed in them."

RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981). This court has often emphasized that in a renewal proceeding, an incumbent licensee "must literally 'run on his record.'" *United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966). In this case, the ALJ concluded that "[s]tated simply, the station failed to operate fully in the public interest. . . ."[9] The ALJ tempered his remedy because of the licensee's inexperience. The Commission explicitly disagreed with this justifica-

[9] 79 F.C.C.2d 625, 644 (1978).

tion for leniency, and offered a full explanation of why denial was appropriate.

Finally, it should be noted that courts give considerable deference to FCC discretion concerning the appropriate sanction to apply to licensee misconduct. *FCC v. WOKO, Inc.*, 329 U.S. 223, 228-29 (1946); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965), *cert. denied sub. nom. W.W.I.Z., Inc. v. FCC*, 383 U.S. 967 (1966). "[T]he Commission is [not] bound . . . to deal with all cases at all times as it has dealt with some that seem comparable." 329 U.S. at 228. Given that discretion we cannot say the sanction was inappropriate in this case.

C. *Substantial evidence.*

Appellant's final claim is that the Commission did not have substantial evidence to support its finding that West Coast did not make good faith efforts to meet its programming proposals. The licensee had the burden of proof on this issue and the Commission determined that West Coast failed to carry that burden in light of, *inter alia*, the following evidence:

—KDIG's actual non-entertainment programming was virtually zero throughout the term and was never close to what it had promised.

—West Coast poured resources and staff into its Orange, Calif. station at the expense of KDIG, reducing the staff at KDIG to three, and thereby making it virtually impossible to comply with its programming promises.

—West Coast's principal acknowledged he was unaware of the nature of KDIG's programming during most of the term.

—The station employees charged with developing public affairs programming neither saw the sta-

tion's ascertainment survey nor were told of its results.

—"only as renewal time approached was any effort made to provide a trained employee for the full-time production of non-entertainment programming."

We cannot say the Commission's conclusion was unsupported or arbitrary or capricious.

Affirmed.

APPENDIX B

FCC 78D-2

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20971

File No. BRH-873

In Re Application of
WEST COAST MEDIA, INC.

For Renewal of License of Station KDIG-FM
San Diego, California

Appearances

Donald B. McCann and *Robert L. Starks*, on behalf of West Coast Media, Inc.; *Anne B. Roberts* and *John R. Phillips*, Center for Law in the Public Interest, and *Charles Firestone*, on behalf of John B. Musselman and Jonathan D. Lewis; and *Charles E. Dziedzic*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
CHESTER F. NAUMOWICZ, JR.

(Issued: January 10, 1978; Released: January 25, 1978)

Preliminary Statement

1. By orders of the Commission released November 5, 1976, and the presiding Judge released June 24, 1977, the above-captioned application was designated for hearing on the following issues: [1]

[1] For convenience the issues designated in the two orders have been consolidated and renumbered in this Initial Decision.

"1. To determine whether West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal as set forth in its 1971 application for renewal of license for Station KDIG during the 1971-1974 license term.

"2. To determine whether the non-entertainment programming broadcast by Station KDIG was reasonably responsive to the community problems, needs and interests during the 1971-1974 license term.

"3. To determine the nature and extent of violations of the Commission's Rules and the terms of station authorization committed by West Coast Media, Inc. for which Official Notices of Violation were issued on September 27, 1974 and November 10, 1975; and whether in light of such violations, West Coast Media, Inc. has exercised that degree of responsibility required of a broadcast licensee.

"4. To determine the facts and circumstances surrounding the disappearance of the program logs of Station KDIG(FM) for the period May 1971-July 1972, and whether such facts and circumstances reflect adversely upon the qualifications of West Coast Media, Inc. to be a licensee of the Commission.

"5. To determine, in light of the evidence adduced under the above issues, whether the applicant has the requisite qualifications to remain a Commission licensee, and whether a grant of the application would serve the public interest, convenience and necessity."

The order of designation further provided that, if the record did not provide a basis for denial of renewal, a determination should be made as to whether a forfeiture

was warranted for matters which might be proven pursuant to Issue No. 3, *supra*.

2. Compliance was had with the statute and rules governing the publication of notice of hearing. Conferences and hearing sessions were conducted on various dates between January 3, 1977 and December 6, 1977, the record being closed on the later date. The filing of proposed and reply findings was concluded on December 28, 1977.

Findings of Fact

3. In early 1970 William C. French, a Cleveland, Ohio advertising man, approached Dominic A. Visconsi, a Cleveland businessman, with a proposal to acquire several FM stations in California. French's idea was to form a network of stations with certain aspects of their operation being centralized. He believed that this would allow economy of operation, and offer an appealing buy for national advertisers. French was not financially able to effectuate the plan, and he was looking to Visconsi for money.

4. The idea appealed to Visconsi who brought in Joseph Potaro, a former Cleveland resident who had moved to California, and Donald B. McCann, a Cleveland attorney. None of the four men had any broadcasting experience.

5. West Coast Media, Inc. was incorporated in Ohio for the purpose of acquiring the FM stations. Visconsi was the sole owner of the corporation. In November of 1970 West Coast purchased Station KTBT(FM), Orange, California, and the call letters were changed to KORJ. French became President and General Manager and Potaro was Vice-President and Treasurer. Visconsi played no role other than as investor, and McCann, at this time, served only as counsel and as go-between for Visconsi and the operating executives.

6. In the Fall of 1970 contracts were executed for the purchase of Station KDIG, San Diego, California and

KVFM, in the San Fernando Valley. At about the same time plans were made to modernize and expand the facilities of KORJ in order that it might serve as the central location for the proposed FM network.

7. However, by the Spring of 1971 clouds had begun to appear on the financial horizon. KORJ was costing more and producing less than French had projected. The whole network policy was much less attractive than it had previously appeared. The purchase of KVFM was rescinded, although the KDIG sale went through in May of 1971.

8. However, Visconsi had lost faith in French's ability to manage the West Coast operation. Although McCann had no experience as a broadcaster, in May of 1971 Visconsi entered into an agreement with him whereby McCann received one share less than 50% of West Coast; assumed the title of President; and took over the General Manager's responsibilities other than those involving sales or matters involving specialized radio or FCC knowledge. In return McCann waived some $60,000 in legal fees due him from Visconsi, agreed to serve without compensation, and agreed, within the limits of his financial ability, to put cash into West Coast equal to 10% of what Visconsi would be required to put in. French retained responsibility for sales, and was given six months to meet sales quotas which were set.

9. At this time the venture was pretty much of a gamble for McCann because West Coast's debts substantially exceeded its assets, and he would gain only if the stations could be made profitable. However, his personal and professional situation permitted him to absent himself from Cleveland for substantial periods, and he undertook the risk. He rented a house near KDIG for some three months and undertook active management of the stations.

10. By October of 1971 it became clear to McCann that the stations could not quickly be made self support-

ing. He advised Visconsi that French could not meet his sales quotas, and that it would require the infusion of some $15,000 a month to keep the stations in operation. Visconsi, who was undergoing reverses in other ventures, advised him that such a sum was impossible and instructed him to pare expenses to the bone.

11. Pursuant to these instructions McCann released French from employment, evolved a plan for automating the stations, and sought authority to reduce the non-entertainment programming on both stations.

12. On December 23, 1971 McCann filed an amendment to the 1971 KDIG renewal application which had been submitted earlier. The amendment cited the stations' financial difficulty, and asserted the need to cut expenses "for any item not essential to the public interest and keeping the stations [2] attractively on the air." It went on to state, "this amendment reflects a substantial reduction (or elimination) of time proposed to be devoted to News, Public Affairs and other programs . . . Management needs to reduce programming that requires staff and supervisory time for preparation of airing. The program now suggested will not be supplied by acquiring tapes of others, or 'filled' with available material for 'off' hours, hoping not to lose audience. Instead it is proposed that competent personnel cover local events only—and aggressively report and take editorial positions encouraging action to improve the communities problems and help solve its needs . . . The extent to which air time of merit to the public can result from the efforts of one man . . . has governed the proposal of three 5 minute programs per day, 7 days a week—or one percent . . . It is intended that well before the next license renewal time, both stations will be devoting more than just an adequate or minimum of time to news, public

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[2] At about the same time an identical amendment was submitted for KORJ.

affairs, religious and instructional types of programs . . ." The amendment proposed the following specific program totals:

	Hours	Minutes	% of Total Time On Air
(1) News	0	0	0%
(2) Public Affairs	1	45	1.1%
(3) All Other Programs exclusive of entertainment and sports.	0	0	0%

13. By letter dated July 25, 1972 the Renewal and Transfer Division of the Commission's Broadcast Bureau acknowledged the amendment stating:

> ". . . While we are not asking for additional information concerning the reduction in programming, it is expected that increased programs will be broadcast during the coming renewal period consistent with the proposal . . . and the operation in the public interest."

In effect, the Commission acknowledged that it understood that there would be sub-standard operation for an unspecified portion of the license period, requiring only an unspecified degree of improvement by an unspecified time.

14. Station KDIG was not automated until May 1, 1972. Until that time, the record indicates that it continued to broadcast a reasonable amount of news and public affairs programs. A tally sheet prepared from the stations' logs [3] indicated the following:

Month	News	Public Affairs
Dec. 1971	7 hrs. 39 min.	6 hrs. 1.5 min.
Jan. 1972	4 hrs. 32 min.	22 hrs. 3 min.
Feb. 1972	6 hrs. 36.5 min.	5 hrs. 45 min.
March 1972	5 hrs. 8 min.	17 hrs. 43 min.
April 1972	3 hrs. 54 min.	20 hrs. 0 min.

[3] As is indicated at paragraphs 42-46, *infra*, the stations' actual logs for the period May 1971-July 1972 were not available at the time of the hearing.

15. On May 1, 1972 KDIG became automated. Initially McCann had contemplated a one man operation, but he came to realize that such a concept was completely unrealistic. However, the staff was very small, and the facilities quite spartan. In addition to an engineer and salesman the only other employee was Mr. Travis Williams who was designated News and Public Affairs Director. The studio/office were crowded into two motel rooms obtained on a trade-out, and a telephone answering service was employed with a contract to keep FCC licensed operators on duty 24 hours a day to monitor the remote meters and remote control the transmitter and to answer the telephone so that the studio/office could be left unattended. Williams recalls that between May 1, 1972 and July 31, 1972, when he left KDIG, the news and public affairs programming of the station was essentially unreduced, although much of it was in the form of tapes produced at KORJ. The tally sheet[4] from the logs supports that recollection for it indicates that the following programming was broadcast:

Month	News	Public Affairs
May 1972	7 hrs. 5 min.	24 hrs. 32 min.
June 1972	7 hrs. 40 min.	24 hrs. 18 min.
July 1972	3 hrs. 34 min.	16 hrs. 30 min.

16. On August 1, 1972 McCann transferred Mr. John C. Fortner, theretofore Operations Director of both stations, to KDIG as Station Manager. He also consented to the hiring of Mr. Sean Casey to assist Fortner with his multiple duties.

17. In the meantime, in early June, 1972 McCann had hired Mr. Reginald Streeter, an experienced broadcaster, as Vice-President and General Manager of West Coast. Streeter quickly became aware that KDIG was not even

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[4] See footnote 3, *supra*.

meeting its 1% news and public affairs proposals,[5] and he discussed it with Fortner. Both men thought that matters would improve if more funds became available and Fortner had more time to devote to the matter.[6] However, their more immediate concern was with the stations' financial survival. In any event, although several witnesses recall some public affairs being broadcast between August 1, 1972 and July 30, 1973, when Fortner resigned, the record does not indicate the quantity of such programs and the logs show no news or public affairs programming as having been broadcast during that period. While a precise finding is impossible, it is found that between August 1, 1972 and July 30, 1973 little or no news or public affairs programming was broadcast over KDIG.

18. In the spring of 1973 both Casey and the engineer left KDIG, and for several months Fortner was alone at the station. When Fortner resigned on July 30, 1973 he and the engineer were replaced, but no one replaced Casey.

19. In October of 1973 Mr. Ross Forbes was hired by West Coast as Operations Director. Both McCann and Streeter emphasized to him that one of his tasks was to increase the non-entertainment programming of both stations to 6% by January 1, 1974. However, it was not until April of 1974 that Mr. Rick Peters was hired as News/Public Affairs Director at KDIG and Ms. Allison Lepen was hired as a secretary who was also to help with public affairs programming. The record indicates that through April of 1974 little or no news or public affairs programming was broadcast by the station.

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[5] It is unclear when KDIG fell below the levels noted at paragraph 15, *supra*. Although logs are available for the period following August 1, 1972, as hereinafter noted, they are unreliable.

[6] Fortner's time was consumed with problems relating to equipment, service, sales and commercial production, all of which seemed to arise on an emergency basis.

20. With the employment of Peters and Lepen the situation changed, but not greatly. Starting in May, 1974 three five-minute news programs were prepared daily, five days a week, with one of the three being rebroadcast once during the evening. The primary source of these broadcasts was a local newspaper.

21. An audience participation program entitled *Speech is Freedom* was commenced on April 29, 1974 and ran until December, 1974. When no member of the audience had a message to deliver a promotional announcement for the program was broadcast. *Speech is Freedom* was scheduled to be broadcast five times a day, but the record indicates that there were more promotions than programs. In fact, although the logs are informative, station personnel recall only one program and that involved a listener concerned with a problem about pets.

22. At this point it would be useful to explain why precise findings as to what was actually broadcast are not being formulated. As is elsewhere discussed herein, the logs between May, 1971 and July, 1972 have been lost, and the record depends upon a tally sheet prepared from those logs before they were lost and upon the memories of various station personnel. The first could not have been useful for meaningful cross-examination; the second is, understandably, vague. On May 1, 1972 the station was automated. Pursuant to the plan of automation, pre-logs were prepared and are available, and as-run logs were made and are also available. However, the record indicates that neither is particularly useful.

23. The station had repeated difficulties with the automation equipment. When it broke down that which was scheduled to be broadcast was not, in fact, transmitted. Hence, the pre-logs, which are merely a record of what was intended to be broadcast, bear no necessary relationship to what was actually broadcast. Similarly, the automatic logger, which was designed to record what was

actually broadcast, would frequently print incorrect information or no information. Moreover, the employee responsible for manual logging when the equipment broke down was undependable. Therefore, the as-run logs are unreliable, and the degree of error cannot be known.

24. The only other purportedly specific information as to the stations' actual programming is supplied by the monitoring conducted by Petitioners May of 1974. However, that monitoring is of limited utility in establishing the stations' overall programming patterns. First, it covered only a one week period, May 23-29, 1974, and there is no showing that the week selected was representative of the overall license period or any significant portion of it. Second, there are substantial gaps, even in the week monitored. These gaps occurred on May 24 from 11:46 a.m. to 1:05 p.m., from 4:20 p.m. to 4:50 p.m. and from 8:07 p.m. to 9:54 p.m.; on May 25 from 3:14 a.m. to 11:41 a.m.; on May 26 from 6:25 a.m. to 8:33 a.m.; on May 27 from 12:20 a.m. to 1:29 a.m., from 5:10 a.m. to 9:15 a.m. and from 12:35 p.m. to 2:14 p.m.; on May 28 from 5:05 a.m. to 8:00 a.m., from 1:22 p.m. to 1:59 p.m. and from 5:54 p.m. to 6:45 p.m.; and on May 29 from 12:22 p.m. throughout the balance of the day. Such monitoring is simply too skimpy to give a reliable indication of the stations' total programming, even for the week during which it was conducted.

25. In May or June of 1974 Peters created a program called "Consumer Report" dealing with consumer problems and rights. The program was run a few times, although the record does not establish how many or on what dates.

26. Allison Lepen was assigned to prepare a program series called the *Great Escape* directed to the needs and interests of women. At least one, perhaps more, programs in the series were produced and run in the summer of 1974, but again the record does not supply the dates or frequency of the broadcasts. When Lepen left

the station around September of 1974 no one was assigned to continue the series.

27. In April of 1974 Mr. Forbes received promotional material for a three-hour program entitled the *Scott Ross Show*. The producers of the program, which was offered to the stations free of charge, contended that the program could be classified as public affairs. West Coast subscribed to the program, and broadcast it regularly starting around May, 1974 and running through the balance of the license period. The *Scott Ross Show* comprised the bulk of the stations' public affairs programming from the Spring of 1974 to the end of that year.

28. However, there is controversy as to whether the *Scott Ross Show* was properly classified as public affairs.[6] On this point, as on so many others, the record is uninformative and contradictory. The licensee presented no transcripts of any of the shows, and relied on the recollections of station personnel. In general they recalled that the show was largely music but with substantial time devoted to discussion between Scott Ross and one or more guests on controversial topics of interest to young people. However, the closest the licensee's case came to specificity on this point was the testimony of Mr. Forbes that one program had included a discussion of drugs.

29. On the other hand, petitioners introduced the transcript of one program and the testimony of Mr. Musselman who had listened to at least portions of 5 Scott Ross shows. The one program transcribed was largely music with the balance being religiously oriented conversation.

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[6] Rule 73.282 defines public affairs programs as those "dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables, vignettes, and extended coverage—of public events or proceedings—." Religious programs are defined as including "sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes."

There were no guests on the show. Musselman does not recall hearing guests on any of the shows he listened to. Moreover, the promotional literature distributed by the producers of the *Scott Ross Show* appears to describe an essentially religious program.

30. It is not found that the licensee has carried its burden of proving that the Scott Ross Show was truly public affairs.[7] Although the evidence is inconclusive it appears that the *Scott Ross Show* was primarily religious using a format of music and reference to various problems to which a religious solution was suggested. Any public affairs content was incidental to the main purpose of the series. In any event, there is absolutely nothing to indicate that the program contained anything directly responsive to the needs and interests of San Diego, and, since the show was produced for national and international distribution, there is no reason to assume that any such material was included.

31. Eliminating the Scott Ross Show as public affairs, it is found that KDIG broadcast very little public affairs programming during the period April-November, 1974. Here again precise findings are impossible. The stations' original submission of its 1974 renewal application did not use the Commission's composite week to describe past programming because it knew that the composite week would show little or no news or public affairs, and it did not regard that as representative of its performance.[8]

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[7] At footnote 7 the order of designation directed that the conflict regarding the classification of the *Scott Ross Program* be resolved at the hearing. Since the licensee claimed the program as a substantial part of its public affairs showing, it was incumbent upon it to establish by clear and convincing evidence that the program was, in fact, public affairs. This it has failed to do.

[8] It has been found that, with the possible exception of the first and last few months of the license period, the station, in fact, broadcast little or no news or public affairs. Hence, a showing to that effect would have been "representative" of past performance as that word is customarily understood.

Instead it used an alternate composite week[9] from the month of June, 1974. However, it is not clear on the record whether one week during June, 1974 was used or whether a composite week was drawn from the entire month.

32. In any event, the station prepared its June week from the pre-logs which, as has heretofore been found, bear no necessary relationship to what was actually broadcast. However, it would not have mattered if the as-run logs had been used. They also are unreliable. Hence no specific finding as to the amount of public affairs programming broadcast can be made. The best that can be found is that from April through November, 1974 KDIG broadcast some public affairs programming, but not an appreciable amount.

33. West Coast's claimed reason for the deficiencies in its news and public affairs programming is its financial inability to produce the programs. Undoubtedly, money was very tight. The corporation was insolvent, and bankruptcy was a real possibility. All non-essential expenses were eliminated and bills were frequently in arrears. West Coast could not continue to operate without the continual infusion of money. By the end of May, 1975 Mr. Visconsi had put over $700,000 into the operation and Mr. McCann had advanced over $50,000. Neither man received any return on his money or compensation for his work during the license period.

34. Nevertheless, it is impossible to make specific findings as to the financial progress of KDIG. West Coast consolidated the financial records of its two stations, and it is impossible to break out either the expenses or the revenues of KDIG alone.

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[9] The renewal form directs that if the Commission's composite week is not used there shall be substituted therefor "a calendar month or longer," not a substitute composite week.

Issue No. 2: Responsiveness of KDIG Programming

35. In 1970, prior to its acquisition of KDIG, West Coast conducted a community ascertainment survey. It identified approximately a dozen areas of local concern. The record indicates that little, if any, of the station's programming was responsive to the ascertained needs and what little may have been was the result of accident rather than design.

36. For the first seven months of the license period, January through July, 1972, Mr. Travis Williams was Station Manager and News and Public Affairs Director for KDIG. As such he had initial responsibility for the station's public affairs programming. No one ever told him about the 1970 ascertainment study, nor did anyone ever tell him what community needs the programming should be responsive to.[10] Hence, such public affairs programming as the station carried during this period could have been only incidentally responsive to the ascertained needs of San Diego.

37. It has already been found that between August, 1972 and July, 1973 while Fortner was Station Manager of KDIG little or no public affairs programming was broadcast. In any event, neither Fortner nor anyone else recalls any specific program content during this period. On such a record it cannot be found that the station's programming was responsive to the needs of the community.

38. The record contains nothing relating to public affairs programming between August, 1973 and April,

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[10] Williams' testimony implies that it was unnecessary for him to be aware of the ascertainment survey because he was under the direction of John Fortner, Operations Director of both stations, who was, presumably, acquainted with the survey. Such an explanation is unpersuasive. It was Williams, not Fortner, who had the day-to-day responsibility for KDIG public affairs programming, and if he was unaware of the ascertained needs, it follows that he could not design a program schedule responsive to them.

1974. Again, it cannot be found that during this period the station's programming was responsive to community needs.

39. From April of 1974 through the end of the license period it has already been found that a small amount of public affairs programming was broadcast. However, the record contains little evidence that any substantial amount of it was responsive to the ascertained needs of the community. The only possible exception [11] was a program called *Employment Opportunity* which broadcast job openings telephoned in by employment offices. West Coast's needs survey had disclosed unemployment to be a problem, but this program was responsive to that need only by coincidence. The show was conceived by Mr. Peters who had never seen the 1970 survey or been told its contents. In short, the station made no use of its community ascertainment survey, and what little public affairs programming it broadcast was not specifically designed to meet the special needs of San Diego.

Issue No. 3: Technical Violations

40. On August 30, 1974 Station KDIG was inspected by Mr. Clarence C. Spillman, the engineer in charge of the Commission's San Diego field office. On September 27, 1974 Spillman issued an Official Notice of Violation alleging 18 violations of the Commission's Rules. Those allegations, and West Coast's remedial action, were as follows:

(a) Rule 73.265(a) required, in pertinent part, that the "required monitoring and metering equipment in an authorized remote control operation shall

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[11] One of the ascertained problems of San Diego involved drugs, and it appears that one of the *Scott Ross* programs dealt with the subject in some manner. However, it is not shown that the content of the program dealt with the specific problem in San Diego, and it is not found that the program was broadcast because it happened to be in response to an ascertained problem.

be readily accessible to the licensed operator and located sufficiently close to the normal operating location that deviations from normal indications of required instruments can be observed from that location." At the time of the inspection the KDIG remote meters were located at a telephone answering service. The physical facilities had the telephone operators seated in a line facing one wall with the remote meters installed on the same wall at the end of the line. On the date of the inspection the licensed operator was seated second from the meters and could not observe them without leaving her seat. Thus, the rule was violated. In a letter dated October 10, 1974 responding to the Official Notice of Violation McCann explained that the situation had been corrected by changing the position of the meters.

(b) Rule 73.275(a)(4) required that "control and monitoring equipment shall be installed so as to allow the licensed operator at the remote control point to perform all the functions in a manner required by the provisions of this part." The citation was issued because of "inability to provide required control—inasmuch as the operating power could not be adjusted." (The power could be adjusted one way but not the other—Spillman could not remember which). McCann's response indicated that the fault lay in a burned-out relay which was replaced.

(c) Rule 73.275(b) required all stations to "be equipped so as to be able to follow the Emergency Action Notification procedures" set forth in the Rules. The citation was issued because KDIG was not so equipped. McCann explained that the fault lay with unworkable equipment, but that new equipment had been ordered on September 11, 1974.

(d) Rule 73.932(a) required all stations to have operable equipment capable of receiving Emergency Action Notifications and Terminations transmitted by other stations. KDIG was cited because its receiver was inoperable. McCann explained that, because KDIG was a non-participating station, he did not understand that it was required to maintain monitoring capability.

(e) (e) and (f) Rule 73.267(b) required that operating power be not less than 90% nor more than 105% of authorized power. The station was cited because its logs indicated that during a 9 day period in 1974 it operated under power and during a 9 day period in 1973 it operated overpower. McCann explained that the underpower operation was caused by concern that mismatched equipment might cause permanent damage if the station was operated at full power,[12] and that the overpower operation stemmed from a misunderstanding by the station's consulting engineer at a time when new equipment was installed.

(g) Rule 73.285 specifies the period of time for which logs must be retained. The station was cited because certain program, operating and maintenance logs were missing. McCann explained that the program logs were unavailable because of failure by the automatic logger. He did not know why the operating and maintenance logs were missing, and could only speculate as to the reasons for their non-existence.

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[12] It is doubtful that the underpower operation was actually in violation of the rule. Sec. 73.267(c) permitted reduced power operation for up to 30 days, provided that the Commission was notified by the 10th day of underpower operation. In that the station operated with reduced power for only 9 days, it is not found that actual notification of the Commission was ever necessary or that the rule was violated.

(h) Rule 73.282(a)(2)(1) requires sponsorship identification for commercial matter. The citation alleges that on 10 occasions between August 2 and August 12, 1973 the automatic logger showed an identifying number, but that the accompanying log did not show what sponsor was associated with the number. McCann explained that the numbers identified promotional spots. Since no commercial matter was involved, the rule was not violated. The citation also alleges that the failure to identify the sponsor associated with the number printed by the automatic logger also violates Rule 73.282(a)(1)(11). Since this rule requires time entries for the beginning and end of each program or program sub-unit, it cannot be found that any defect in sponsor identification violates the rule.

(i) Rule 73.281(a) requires program logs to be signed by an employee having actual knowledge of the facts. The citation alleges no such signatures appeared on the logs for September 1973. McCann explained that the station's procedure had been to have the employees sign separate certifications which were attached to the logs, and he speculated that the certifications may have become detached when the logs were filed. While the separate certification is not unacceptable, it is the duty of the licensee to retain it in order to demonstrate that the rule is being followed. It is found that the rule was violated.

(j) The citation alleges violation of Rule 73.281(c)(2). There is not now nor was there at the time of the inspection any Rule bearing that number. Hence, no violation can be found.[13]

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[13] The citation contains explanatory text from which it may be deduced which rules that West Coast is actually accused of vio-

(k) The citation alleges violation of Rule 73.282(a)(iii). There is not now nor was there at the time of the inspection any Rule bearing that number.[13]

(l) Rule 73.295(e) requires the maintenance of a daily program log describing material transmitted under a Subsidiary Communications Authorization. McCann acknowledged that this had not been done, but asserted that the situation had been corrected.

(m) Rule 73.281(b) requires that each log be dated. The citation alleges that the operating logs for September 1973 contained the month and day but not the year. McCann acknowledged the violation, but asserted that it had been corrected.

(n) Rule 73.283(a)(1) requires entry on the operating log of the start and stop time for power supply to the antenna. The citation alleges that no such entries were made between September 1 and September 20, 1973. McCann explained that since the station operated full time there was no start and stop time and he had thought the rule to be inapplicable. The presiding Judge agrees with McCann's interpretation of the rule and no violation will be found. The Commission is not unaware that a full time station in normal operation does not start or stop its power, and the rule does not require the entry upon the logs of totally useless information.

(o) Rule 73.283(a)(5) requires entries in the operating logs of the times at which the tower lights were checked. The citation alleges that no

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lating. However, licensees are not required to deduce that which they are accused of, and an Official Notice of Violation which cites incorrect or non-existent rules is fatally defective insofar as the improper citations are involved.

such entries were made for the periods September 1-20, 1973 and August 13-29, 1974. McCann replied that KDIG leased its tower from another station and relied on that station to check the tower lights. It is found that the rule was violated. The duty to check tower lights is imposed on each station, and, absent an agreement pursuant to Rule 73.1213 which is not alleged to have been then in existence, it cannot be delegated.

(p) The citation alleges violation of Rule 73.96(e)(5). There is not now nor was there at the time of the inspection any Rule bearing that number. Hence, no violation can be found.[13]

(q) Rule 73.295(f) requires operating log entries for the on and off times of Subsidiary Communications Authorization operation. The citation alleges the rule was violated between August 13, 1974 and August 24, 1974. McCann explained that the entries were not made because the SCA is operated on a continuous basis. For the reasons stated at paragraph 40(n), *supra*, no violation is found.

(r) Rule 73.265(g) prohibits the assignment to the operator at the remote control point of duties which would interfere with the proper operation of the transmitting system and keeping of required logs. The citation alleges that the rule was violated because the operators at the telephone answering service which served as the station's remote control point were too distracted by their other duties to properly perform their duties for KDIG. The record contains no evidence supporting this allegation, and no violation will be found. While the duties of a telephone operator are, no doubt, distracting, the record

contains no showing that they are more distracting than those performed by conventional engineering personnel.

41. On October 31, 1975 KDIG was again inspected by the Commission. On that occasion the station was inspected by Mr. Robert C. Haggerty, an electronic engineer, employed in the San Diego field office. As a result of that inspection another Official Notice of Violation was issued, this time alleging 7 violations. These allegations and West Coast's responses were as follows:

(a) Rule 73.275(a)(5) requires remote control meters to be calibrated within 2% of the corresponding meters at the transmitter site. The citation was issued because the regular and remote final plate voltage meters differed by 2.9%. In a responsive letter dated November 20, 1975 McCann did not deny the violation and asserted that the station's engineer was now making daily checks of the meters.

(b) Rule 73.265(a) requires that a properly licensed operator be on duty at the remote control point. The citation was issued because no such operator was on duty at the telephone answering service on the day of the inspection. McCann's letter acknowledged the violations, and it is found that this was a significant breach of the rules. If a licensee elects to contract out certain of its duties such licensee has an obligation to insure that those duties are performed in accordance with the rules.

(c) Rule 73.283(a) requires operating log entries to be made by a properly licensed operator. The citation was issued because the log entries on 24 occasions during October, 1975 were made by persons not holding an appropriate license. This violation is directly related to that found at

paragraph 41(b), *supra*, and is viewed with equal gravity. Plainly, at this time West Coast was failing to reasonably monitor the job the telephone answering service was doing at the remote control point.

(d) Rule 73.284(a)(7) requires the maintenance log to contain notations as to the quarterly inspection of tower lights. McCann explained that an agreement had been entered into whereby the owner of the tower had assumed responsibility for the lighting, and a copy of that agreement had been filed with the Commission on October 17, 1975 pursuant to Rule 73.1213. Under such circumstances, the rule was not violated.

(e) Rule 73.254(c) requires that equipment performance measurements be kept on file. McCann explained that the latest performance tests had been conducted in August, 1975, and had not been typed up at the time of the inspection. While this indicates a lack of diligence, it does not constitute violation of the rule cited.

(f) Rule 73.265(f) requires that operators be fully instructed in the performance of their duties. The citation was issued because the operator on duty was not knowledgeable with respect to adjustments in power to compensate for fluctuations in line voltage. McCann replied that the operator was simply flustered by the inspection, but that she was knowledgeable in her duties and had an instruction manual available. The explanation is uncontradicted and will be accepted. No violation is found.

(g) The violation of 73.265(g) is the same as that discussed at paragraph 40(r), *supra*. For the reasons stated at that paragraph no violation is found.

Issue No. 4: Missing Logs

42. In November 1974 McCann directed Streeter to review the KDIG logs for the purpose of responding to the recently filed Petition to Deny. Upon conclusion of the review in December, 1974 the logs were locked in a cabinet in the KDIG studio.

43. Late in 1975 the logs were transferred to West Coast's Station KORJ in Orange County, California where they were kept in locked file drawers. In January, 1976 Streeter resigned from West Coast and his place was taken by Mr. Barry McCann, Donald McCann's son. In April of 1976 the two McCann's inspected the files and verified that all of the logs were in fact locked therein. In July of 1976 KORJ was sold, and at that time Barry McCann at the request of Donald McCann placed the KDIG logs into cardboard packing cases to which he affixed content labels.

44. The packing cases were sent in August 1976 to a residential apartment in San Diego which served as temporary auxiliary quarters for KDIG. When they arrived both McCanns verified that the relevant packing cases were actually delivered.

45. In November 1976 the KDIG property was moved from the residential apartment to a newly rented office. Barry McCann recalls that the relevant packing cases were, in fact, delivered to the new quarters. Subsequently, he directed an employee, he does not recall which one, to place the logs together with other materials into a locked closet. He believes that this was done but he does not have personal knowledge.

46. In February 1977 Donald McCann directed Barry McCann to send the logs to Cleveland. When Barry McCann searched for them he was unable to locate the logs for the period May 1971-July 1972. A thorough search was conducted and all of the employees involved were

questioned. However, no one is able to explain what happened to the missing logs.

Conclusions

Issue No 1: West Coast's Efforts to Effecuate Its Proposal

47. This issue must, of course, be resolved on the basis of what West Coast actually proposed in its 1971 renewal application, as amended. Essentially what the station represented to be its intention was (1) to eliminate news; (2) to reduce public affairs programming to 1.1% of its total air time; (3) to concentrate on local events in its truncated public affairs schedule; and (4) to increase substantially "news, public affairs, religious and instructional" programming at an unspecified time "well before" the expiration of the license term. This is the proposal which the Commission accepted and, in effect, authorized when it acknowledged the amendment to the renewal application.

48. The record is clear that West Coast lived up to neither the letter nor the spirit of its commitment. Although the loss of the logs covering the early part of the license term and the unreliability of the later logs have rendered it impossible to formulate precise findings of fact, it is apparent that at least between August 1972 and April 1974 the station failed to devote even 1.1% of its time to public affairs programming.[14] Moreover, since during most of this time there was no one at KDIG with any time or money to devote to the production of public affairs programming, it is concluded that if any public affairs programs were broadcast they did not meet West Coast's promise to concentrate on "local" affairs.

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[14] Although it appears that prior to August 1972 and subsequent to April 1974 KDIG did carry somewhat more non-entertainment programming, West Coast has failed to establish that even during these periods its programming approximated in quantity or nature that which it proposed.

49. In the spring of 1974 non-entertainment programming increased. However, since most of that increase is attributable to the carrying of a single syndicated program series,[15] the *Scott Ross Show*, which has been found to be fundamentally a religious series, it is concluded that the station failed to upgrade its programming in the manner which it had promised. The thrust of West Coast's representation to the Commission was that there would be an increase in locally oriented news, public affairs, religious and instructional programming. Neither the letter nor the spirit of that commitment was met by simply filling a large time block with a nationally syndicated religious program.

50. The situation is exacerbated by West Coast's inherently misleading description of its past programming in the 1974 renewal application. The station did not use the Commission's composite week because it claimed that

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[15] The station did make some effort to present local public affairs programming; but that effort was largely abortive. Although a new Operations Director was employed in October of 1973 with instructions to increase the station's non-entertainment programming to 6%, another six months passed before West Coast even hired the new employees which experience had proven essential if the instructions were to be carried out. Thereafter, while concepts for public affairs programs were evolved, little actual local programming was developed. *Speech Is Freedom* turned out to be largely a self promotion rather than a program series. *The Great Escape* produced very little in the way of actual programming. Indeed, the only local series which seems to have gotten off the ground was *Employment Opportunity*, and, so far as appears from the record, that program comprised only a very small percentage of the station's total time. These failures cannot be attributed solely to the employees involved. By the start of 1974 top management including Mr. McCann, were no longer neophytes at broadcasting: they had been exposed to the realities of the industry. They knew or should have known, that a simple directive from non-resident management does not guarantee performance. Nevertheless, a very small staff with limited resources was entrusted with the duty of ensuring that the station met its programming commitments, and that staff was not closely supervised or monitored.

week would have been unrepresentative of its actual performance since it would have shown little or no news or public affairs. In fact, such a showing would have been entirely representative of what was actually broadcast during most of the license term. The month [16] which the applicant selected, June 1974, was far less representative. Although no issue has been designated requiring a determination as to whether the showing in the 1974 renewal application was misleading or deceptive, the fact that the showing was actually misleading may be of significance in evaluating whether the applicant had made reasonable and good faith efforts to carry out its programming proposal during the license term which the 1974 application purportedly described. The applicant's reluctance to candidly describe what it actually did implies awareness of its programming shortcomings and casts doubt on the sincerity of its attempts to carry out its representations.

51. That doubt is reinforced by the applicant's poor evidentiary showing on its main line of defense: that its performance was the product of financial difficulty rather than deliberate intention. The record is clear that West Coast was not meeting expenses. It survived only because Mr. Visconsi, and to a lesser extent Mr. McCann, supplied money to meet expenses. Nevertheless, the details upon which an objective judgment might be made are not in the record.

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[16] As noted at paragraph 31, *supra*, the record is unclear as to just which week during June 1974 was used by West Coast in preparing its 1974 renewal application. However, the matter is not decisionally significant. The June 1974 logs were unreliable, and even if they could be depended upon the station's performance during that month was not representative of its performance during the license term as a whole. By that time the station was airing more non-entertainment programming, whether the *Scott Ross Show* was classified as public affairs or religious, than it had throughout most of the license period.

52. West Coast kept a consolidated balance sheet from which it is impossible to break out the financial history of KDIG. Hence, the record does not show either expenses or revenues attributable solely to the corporation, Station KORJ or Station KDIG. There is no way of telling whether KDIG, standing alone, made a net contribution to or a net drain from corporate resources. The record does not even address, much less answer, the vital questions. Plainly, the station was run during much of the license period by a skeletal staff severely inhibited as to even the most elementary expenses. But, was this spartan atmosphere dictated by the economic realities of KDIG or by the broader economic imperatives of West Coast? The record is silent. What were the operating expenses of KDIG? What was the cost of debt service attributable to KDIG? What were the revenues of KDIG? The record addresses itself to none of these fundamental questions. Accepting the fact that Visconsi and McCann advanced a great deal of money, where did it go? The record does not answer. Operational expenses at KDIG simply could not have been substantial. Staff was minimal, office and studio space was obtained on a trade-out, even the job of remote control was contracted out to an answering service. The cost of operating the station simply could not have been high, certainly not approaching the more than three-quarters of a million dollars which Visconsi and McCann put into West Coast to keep it afloat. Perhaps debt service on acquisition costs for KDIG inflated the costs, but, if so, the record does not clarify the significance of this factor. Presumably KDIG produced some revenues to offset costs, but the record gives no indication as to what these revenues may have been. In short, West Coast has failed to offer convincing proof in support of its claim that the operation of Station KDIG was so unprofitable that it was economically impossible to effectuate its program proposals.

53. This record does not indicate that the licensee made proposals to the Commission which it did not then intend

to keep. However, neither does it indicate that with the passage of time the licensee made sincere efforts to carry out those proposals. It neither devoted the resources necessary to effectuate its proposals nor did it convincingly demonstrate that the resources were not available to it. It has failed to prove that it made reasonable and good faith efforts to carry out its non-entertainment programming proposal.

Issue No. 2: Responsiveness of KDIG Programming

54. Because of the vague and general nature of the evidence as to KDIG's programming it has not been possible to formulate findings as to the relationship between the needs of the community and what the station actually broadcast. It is only possible to reach the general conclusion that the paucity of locally originated programming renders it most unlikely that KDIG responded to the needs of San Diego in any significant fashion. In any event, it must be concluded that, whatever the station may have broadcast, West Coast has failed to carry its burden of proving that its non-entertainment programming was reasonably responsive to community needs and problems.

55. In reaching the foregoing conclusion great weight has been attached to the fact that, throughout the license term, the persons initially responsible for preparation of the programming were completely unaware of the results of the 1970 ascertainment survey. By allowing this situation to arise and exist West Coast demonstrated indifference to whether its programming was responsive to the needs of its community. It is therefore concluded that not only did West Coast fail to prove the responsiveness of its programming, it failed to show that it even made the most elementary effort to broadcast responsive programming.

Issue No. 3: Technical Violations

56. The August 30, 1974 inspection resulted in a citation alleging 18 rule violations. It has been found that

ten of the alleged violations actually occurred. However, none of the violations demonstrate an egregious disregard for the Commission's rules. One was a technical violation of dubious significance (Rule 73.281(b)): two others lay in malfunctioning equipment which was repaired (Rules 73.275(a)(4) and 73.275(b)): and three others stemmed from a misunderstanding by the licensee as to the requirements of the rules (Rules 73.932(a), 73.282(a)(5) and 73.276(b)). The remaining violations, while less satisfactorily explained, appear to have been caused by employee carelessness or neglect rather than by any abdication on the part of the licensee of its obligations to insure proper operation of the station.

57. The October 31, 1975 inspection resulted in a citation alleging 7 violations. It has been found that three of the violations actually occurred. Here again the violations appear to have risen from a failure to tightly supervise those persons entrusted with the day-to-day operation of the station rather than a deliberate disregard of the rules. While West Coast is to be censured, the record does not demonstrate a pattern of conduct which indicates that future operations are likely to be rife with violations of the technical rules.

58. In short, it has been proven that at the time of the two inspections, KDIG was being operated less than perfectly from a technical standpoint. However, the rule violations were not so numerous or of such nature as to create serious doubts as to the licensee's technical ability to operate its facility.

Issue No. 4: Missing Logs

59. The presiding Judge is unable to attach decisional significance to the fact that certain relevant logs are missing. Undoubtedly, the logs are important and West Coast had an obligation to retain them. However, the record indicates that West Coast was aware of its obligation and took reasonable steps to meet it.

60. The logs were kept in locked containers, and both Donald and Barry McCann verified their safety from time to time. Although it was necessary to move them on more than one occasion, reasonable precautions were always taken to insure their safety. That such precautions proved to be inadequate does not require a conclusion that West Coast deliberately or negligently failed in its duties. The logs were lost for reasons unknown. West Coast's case on other issues has been weakened for lack of what would have been better evidence of its performance, but the fact that the logs were lost does not warrant any adverse conclusion *per se*.[17]

Ultimate Conclusions

61. Serious adverse conclusions have been reached with respect to West Coast's operation of Station KDIG. It has been concluded that the applicant failed to make reasonable, good faith efforts to effectuate its program proposals, and failed to offer convincing evidence in support of its claim of financial inability. It has also been concluded that the station failed to present any significant non-entertainment programming which was reasonably responsive to local needs. Stated simply, the station failed to operate fully in the public interest during the 1971-1974 license period.

62. If future performance is to be surmised solely from past performance, it must be concluded that the public interest would not be served by renewal of the KDIG license. However, certain factors lead the presiding Judge to temper that judgment.

63. First are the circumstances surrounding West Coast's entry into the broadcasting business. Messrs. Visconsi and McCann undertook to operate broadcast stations

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[17] The presiding Judge reaches no conclusion as to whether loss of the logs might constitute a violation of Rule 73.285. Since no issue specifically directed to that rule has been designated, conclusions framed in terms of the rule would be inappropriate.

at a time when they knew nothing whatsoever about the industry. They were presented with a plan for operation of a mini-network which plausibly appeared attractive to their untrained eyes, however obvious its shortcomings may have been to experienced broadcasters. They simply did not understand the problems of management and operation inherent in multi-station operation. They did not appreciate what was involved in production, and the necessity of having personnel competent in both the technical and managerial areas. They thought they understood the potential of automated operation but they failed to grasp its limitations. They did not understand the competitive realities of the markets they entered or the importance of facilities and formats. In short, they didn't know what they were getting into.

64. When reality began to intrude, their actions were not irresponsible. McCann advised the Commission quite promptly of the financial difficulties, and amended the station's programming proposal to something that looked reasonably possible to effectuate. The presiding Judge has been persuaded that when McCann filed the December 23, 1971 amendment he truly believed that he could carry out his commitment. He still didn't understand that the production of even a minimum amount of local public service programming requires personnel of certain competence and a certain amount of time. Thus, althought it has been concluded that West Coast did not devote sufficient resources to KDIG to constitute a reasonable good faith effort to effectuate its commitment, the presiding Judge is convinced that the failure stemmed from ignorance of what was required rather than from a deliberate attempt to avoid performance.

65. The presiding Judge is also impressed with the sincerity of the West Coast witnesses. The content of their testimony, as well as their demeanor in presenting it, persuaded him they have told the truth as they understand it. The only attempt at concealment was the mis-

leading description of past programming contained in the 1974 renewal application. However, this single transgression does not overcome the overall impression that the West Coast principals are honorable men who have erred because of ignorance and misjudgments. Experience has dispelled their ignorance, and misjudgments are less likely to occur.

66. On the whole, the presiding Judge does not believe that, in this instance, the past is a reliable guide to the future. The mistakes that occurred were not the result of a deliberate plan to evade responsibility or compliance with obligations. It seems reasonable to believe that West Coast now understands what is required in the way of personnel, resources and management if it is to fulfill its public service obligations. It is concluded that the public interest does not require denial of the instant renewal application.

67. There remains to be considered whether some lesser sanction is appropriate. The Order of designation contains a Notice of Apparent Liability in the maximum sum of $10,000.00. However, the only matter considered in this record which occurred within one year prior to the issuance of the Notice of Apparent Liability on October 21, 1976 was the inspection of October 31, 1975.[18] It has been found that this inspection uncovered only three violations and that none of those were egregious. Forfeiture does not seem warranted in these circumstances. In any event, where the station's deficiencies were caused at least in part by a shortage of money it seems somewhat incongruous in the public interest to add to the station's problems by depriving it of funds through the imposition of a forfeiture.

68. This is not to say that no action at all should be taken. The Commission is entitled to some assurance that

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[18] See 47 U.S.C. 503(b)(3).

West Coast is now truly capable of operating KDIG in the public interest. A normal three year renewal is not justified. Rather, the KDIG license will be renewed for only one year in order that the Commission may review the station's performance promptly and take such actions as circumstances may dictate.

Accordingly, IT IS ORDERED, that unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Rule 1.276, the application of West Coast Media, Inc. for renewal of license of Station KDIG(FM) IS GRANTED for a period of one year from the effective date of this Initial Decision.[19]

CHESTER F. NAUMOWICZ, JR.,
CHIEF ADMINISTRATIVE LAW JUDGE,
FEDERAL COMMUNICATIONS COMMISSION.

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[19] Under Rule 1.276 appeals in the form of exceptions to the Initial Decision must be filed within 30 days of the public release date of a full text hereof, unless an extension of time is duly granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50 day period, or taken any of the actions specified at Rule 1.276(c), the Initial Decision becomes effective pursuant to Rule 1.276(c).

APPENDIX C

FCC 80-116

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20971

File No. BRH-873

In re Application of
WEST COAST MEDIA, INC.

For Renewal of License of Station KDIG-FM
[now KIFM] San Diego, California

Appearances

Donald B. McCann, (Kelley, McCann & Livingstone) on behalf of West Coast Media, Inc. with *Robert L. Starks* (Kelley, McCann & Livingstone), and *John W. Pettit* and *Louise A. Sunderland* (Hamel, Park, McCabe & Saunders) on the brief; *Anne B. Roberts* on behalf of petitioners to deny with *John R. Phillips* (Center for Law in the Public Interest) and *Charles M. Firestone* (UCLA Communications Law Program) on the brief; and *Charles E. Dziedzic* on behalf of the Chief, Broadcast Bureau with *Charles W. Kelley* on the brief.

DECISION

(Adopted: July 24, 1980; Released: August 25, 1980)

BY COMMISSIONER FOGARTY FOR THE COMMISSION: COMMISSIONERS LEE AND QUELLO CONCURRING IN THE RESULT.

1. This proceeding involves the application of West Coast Media, Inc. for renewal of the license of Station KDIG-FM (now KIFM) at San Diego, California.

Briefly, the circumstances which led to the designation of this hearing are as follows:

2. In 1970, West Coast Media, Inc. (West Coast) was formed by Dominic Visconsi, who wholly owned it. Visconsi, a wealthy Cleveland businessman with no broadcast experience, was persuaded to set up a network of FM stations in California by William French, a friend in the advertising field who also lacked broadcast experience. Two stations were purchased, KORJ(FM) in 1970 and KDIG-FM in 1971.[1]

3. French was installed as a general manager of both stations until it became clear they were losing money, and he was removed. Visconsi then transferred 49% of his West Coast stock to Donald McCann, his Cleveland attorney, who moved to California for 3 months and personally supervised and managed the stations. KDIG had an antiquated monaural transmitter and was the only monaural FM station in the San Diego market. McCann concluded after studies that KDIG could survive only by increasing power and converting to stereo operation. Visconsi agreed to lay out funds to cover operating losses ($15,000 monthly for both stations) to keep the stations on the air pending conversion to stereo, but he instructed McCann to reduce the cash drain to a minimum. McCann proposed and Visconsi agreed to automate KDIG during the interim period of continued monaural operation and to reduce public service programming (news, public affairs and "other" non-entertainment programming).[2]

4. *West Coast's 1971 Programming Promises.* When KDIG filed its first renewal application, 4 months after

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[1] Only KDIG-FM is involved in this proceeding.

[2] Public affairs includes programs dealing with local, state, regional, national or international issues or problems. "Other" includes all programs not falling within the definitions of instructional, general educational, performing arts, news, public affairs or light entertainment. Rule 73.1810(2)(v) and (vii).

West Coast's application, it had proposed to broadcast 5.83% news, 1.53% public affairs, and 1.53% "other programming exclusive of entertainment and sports".[3] However, on December 29, 1971, as McCann and Visconsi agreed, it amended the proposal citing financial losses as the reason for temporarily eliminating all news and other non-entertainment programming except public affairs. West Coast promised to broadcast at least 1.1% in that category. The accompanying statement further promised that the 1.1% public affairs would not be preproduced tapes; instead, one competent programmer would prepare three 5-minute programs per day, seven days a week by local investigation and reporting behind the scenes.[4] West Coast related that its management people were very much aware of the public service programming obligations "[b]ut it must be permitted to keep the stations viable and on the air in the meantime, until the present financial drain is reversed". Finally, West Coast promised:

> It is intended that well before the next license renewal time, both stations will be devoting more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs . . . .[5]

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[3] Att. 1, WCM Ex. No. 8.

[4] West Coast stated: "Instead, it is proposed that competent personnel cover local events only—and aggressively report and take editorial positions encouraging action to improve the community's problems and help solve its needs. . . . The extent to which airtime of merit to the public can result from the efforts of one man searching the community, attending gatherings, investigating behind the scenes; and then condensing the material into listenable, informative and motivating matter, has governed the proposal of three 5 minute programs per day, 7 days per week—or one percent (sic) . . ." Att. 2 WCM Ex. No. 8.

[5] Att. 2, WCM Ex. No. 8.

5. In his written hearing testimony, McCann explained his thinking at the time the amendment was filed as follows:

> I was conscious of the fact that the former owner of KDIG was doing no news, no public affairs, and no 'other' non-entertainment programming except two weather forecasts per day, prior to the purchase by West Coast Media, and I reasoned that this was not objected to by the FCC because of their losing money. I decided to apply for relief from the proposal made by Mr. French in July of 1971, for both stations, because we were losing over $10,000 per month, and composed a request for relief for both KDIG and KORJ . . .[6]

6. The Broadcast Bureau's Renewal and Transfer Division acknowledged West Coast's amendment by its letter dated July 25, 1972, stating: "While we are not asking for additional information concerning the reduction in programming, it is expected that increased programs will be broadcast during the coming renewal period consistent with the proposal".[7]

7. KDIG's next license renewal application became due August 1, 1974, for the term ending December 1, 1974. In preparing the 1974 renewal application during May 1974, KDIG's general manager, Reginald Streeter, used program schedules depicting programming planned for June 1974 for KDIG's Composite Week showing in lieu of the seven days from the license term as officially designated by the Commission. However, the logs for the officially designated days were also filed with the renewal application, revealing no public service programming was aired on those days. It developed that KDIG did not follow its program schedule in June 1974 in all respects and the Broadcast Bureau requested KDIG to explain

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[6] McCann testimony at 10, WCM Ex. 8.

[7] Att. 4, WCM Ex. No. 8.

these apparent inaccuracies.[8] In response, KDIG explained that it had used a schedule instead of logs in preparing the showing and conceded the showing was therefore inaccurate.[9]

8. John L. Musselman and Jonathan D. Lewis, college students in the San Diego area, monitored KDIG during the license term, examined station documents, and filed a timely petition to deny KDIG's 1974 renewal application. The Commission found in the designation order that West Coast had not adequately responded to the petitioners' allegations regarding (a) whether KDIG had met its 1971 non-entertainment programming promises, or (b) whether KDIG's non-entertainment programming had been responsive to the public's problems, needs and interests. The Commission, therefore, specified a promise-versus-performance issue and a programming responsiveness issue.[10]

9. After designation of the application for hearing, Musselman and Lewis filed a petition to enlarge issues, asserting for the first time that a misrepresentation issue was warranted because the inaccuracies in the Composite Week showing and a misclassification of a religious program (The Scott Ross Show) as public affairs were deliberate attempts to mislead the Commission. They further asserted that the use of June 1974 in the Composite Week showing misrepresented that that programming was typical of term performance. The ALJ denied the petition to enlarge because, he stated, the Commission had all the important facts before it when it designated the application for hearing and did not specify a misrepresentation issue.[11]

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[8] Att. 20, WCM Ex. No. 8.

[9] Att. 21, WCM Ex. No. 8.

[10] 61 FCC 2d 577 (1966).

[11] The ALJ's denial of issue enlargement is cited as error by the petitioners to deny and the Broadcast Bureau in their exceptions.

10. *Initial Decision.* In his Initial Decision,[12] the ALJ found that West Coast's evidence of KDIG's programming during the 1971-1974 license was inadequate to meet its burden of proof. Programming logs were lost for the term-period December 1971 through July 1972. And although the ALJ relied on "tally sheets" prepared by station employees prior to loss of the actual logs, he concluded that prior to August 1972 KDIG carried somewhat more non-entertainment programming than in the middle of the term but it had failed to establish it approximated in quantity or nature that which it proposed. As to the period May 1972 to April 1974, the ALJ found KDIG's logging was automated, the equipment often malfunctioned, the evidence was unreliable, and that the available evidence showed KDIG aired almost no public affairs and no news or "other" public service programming. He concluded upgrading began in April 1974. However, the principal reliance for public affairs programming after April 1974 was a 3-hour Sunday program, The Scott Ross Show. The ALJ found that this was a religious program, improperly classified as public affairs, leaving "very little public affairs programming during the period April-November 1974". He concluded overall that the 1.1% public affairs promise was not met; nor did KDIG increase public service programming "well before" the end of the term as it had promised. Finally, the ALJ rejected West Coast's claim that its financial condition prevented its earlier production of news and public affairs programmings.

11. The ALJ further concluded the "situation is exacerbated by West Coast's inherently misleading description of its past programming in the 1974 renewal ap-

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[12] FCC 78-2, released January 25, 1978. Two additional evidentiary issues were resolved favorably to KDIG in the Initial Decision. No exception is taken under these issues and they are not of significance to the appeals.

plication".[13] Finally, the ALJ resolved the programming responsiveness issue against West Coast because its vague and general evidence of programming could not carry the burden of proving its non-entertainment programming was reasonably responsive to community needs and problems. Summing up, the ALJ concluded: "Stated simply, the station failed to operate fully in the public interest during the 1971-1974 license period" and the public interest would not be served by renewal "[*i*]*f further performance is to be surmised solely from past performance*".[14] [emphasis supplied].

12. Nevertheless, the ALJ granted KDIG one year renewal term, "tempering" the above judgment for the following reasons: the principals lacked experience and did not know what they were getting into, their failures stemmed from ignorance rather than a deliberate attempt to avoid performance, and when reality intruded they acted reasonably. The ALJ's overall impression was ". . . that the West Coast principals are honorable men who have erred because of ignorance and misjudgments. Experience has dispelled their ignorance, and misjudgments are less likely to occur".[15]

13. *Exceptions.* Three appeals[16] are now before us for consideration. The petitioners to deny and the Broadcast Bureau argue that the record will not support the public interest findings which must be made under Section 309(a) of the Communications Act to warrant grant of the renewal application. West Coast supports the Initial Decision in all principal respects, interposing

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[13] *ID.* at para. 50.

[14] *ID.* at para. 61 and 62.

[15] *ID.* at para. 65.

[16] Before us for consideration are the exceptions and brief filed on April 3, 1973, by John L. Musselman and Jonathan D. Lewis (the petitioners to deny), the Broadcast Bureau, and by West Coast Media, Inc. All parties filed reply briefs.

limited exceptions, and arguing that a full term renewal should be granted by the Commission.

Discussion

14. We have carefully examined the Initial Decision in light of the exceptions, and briefs, our examination of the record and the arguments of the parties [17] and are convinced that there is an adequate record basis for the ALJ's findings. They shall be adopted with the modifications and supplemental findings indicated below. In our view, however, West Coast's failure to comply with the spirit or letter of its programming promises is determinative of the outcome of the proceeding and, as a result, we shall not renew KDIG-FM's license.

15. Before explaining our disagreement with the ALJ, it may be helpful to describe the Commission's general approach to promise versus performance.[18] The Commission has not set minimum programming requirements to qualify for renewal; rather, in accordance with the public interests standard established in Section 309(a) of the Communications Act, the licensee is obliged to comply substantially with its promises for future performance, or to justify any substantial variations. Insubstantial variations do not raise a question of the licensee's ability to operate in the public interest. The Commission recognizes that community needs are not static in nature; therefore, the licensee may modify its programming proposals in the light of the changes in community needs. For this reason, the Commission confines its review of programming performance to a determination of whether the licensee made reasonable and good

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[17] Oral argument was held before the Commission *en banc* on January 22, 1980.

[18] *See* generally *National Association for Better Broadcasting* v. *FCC*, 591 F.2d 812 (D.C. Cir. 1978); *also see KORD*, 31 FCC 85 (1961).

faith efforts to effectuate its proposal. Moreover, the licensee must show that its programming has been appropriately responsive to community problems, needs and interests.

16. End-of-term upgrading does not mitigate a prolonged failure to provide the public service programming which has been promised for the license term. When the licensee fails to broadcast promised non-entertainment programming, factors beyond the licensee's control, such as financial inability to produce non-entertainment programming, may nevertheless justify a grant of the renewal application. However, a favorable public interest finding cannot be made where the licensee has demonstrated blatant disregard of its prior programming commitments, or where the licensee does not justify substantial variations from the programming promises contained in its prior renewal application. As will be discussed more fully below, the record evidence demonstrates that West Coast's programming during the 1971-1974 license term represents a substantial variation from its proposal, that it failed to make reasonable and good faith efforts to effectuate its proposal, and that West Coast failed to show that its nonperformance was due to factors beyond its control. We turn now to a discussion of the parties' arguments on each of these points.

17. *KDIG's Performance During the 1971-1974 License Term.* As a preliminary matter, we reject West Coast's claims that it was improperly denied credit in the Initial Decision for The Scott Ross Show. In our view, as in that of the ALJ, that program cannot reasonably be classified as public affairs; rather, the program was clearly religious in nature.[19] Indeed, the promotional material which the producers sent to stations identified the 3-hour taped program as "the bible of the record industry" and claimed the show had won a number of awards as a re-

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[19] *See* note 2, *supra*.

ligious program.[20] We believe West Coast was alerted by the promotional material that it could not legitimately claim as public affairs all three hours, especially periods of music as distinguished from discussion periods. While programs dealing partly with public affairs and partly with religion or entertainment can be segmented for classification purposes,[21] because West Coast made no effort to assess what portions might reasonably have qualified as public affairs, no credit may be given. As a result, we believe the ALJ properly excluded The Scott Ross Show from the tabulation of programming which West Coast can rely on as performance in fulfilment of its programming commitments for the 1971-1974 license term.[22]

18. Second, we agree with the petitioners and the Broadcast Bureau that West Coast's programming evidence lacked sufficient probative value to support quantitative findings and, as a result, that West Coast did not meet the burden of proof it bears under the programming issue. We agree with their assessment that the licensee's showing can be characterized as sketchy at best. However, even if we were to accept West Coast's claims as to the amounts of news and public affairs programming it broadcast, these meager amounts would not support a finding that West Coast had fulfilled its programming promises.[23]

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[20] *See* Petitioners' Ex. No. 4.

[21] *See Newhouse Broadcasting Corp.*, 61 FCC 2d 528, 534 n.8 (1976), *Voice of Dixie, Inc.*, 53 FCC 2d 679 (1975).

[22] Nor, as West Coast claims in its exceptions, can we credit it for public service announcements aired in June 1974. There is no provision in the Annual Programming Report (FCC Form 303-A) for the notation of time given to PSA's during the composite week. The only programming categories to be reported are "news", "public affairs", and "other", the latter category being exclusive of entertainment, sports, and PSA's.

[23] West Coast claims (with adjustment to eliminate The Scott Ross Show from public affairs) to have broadcast the following

19. West Coast's presentation of 0.93% news during the eight months from December 1971 through July 1972, at which time its amended programming proposal was accepted by the Commission, fell substantially below the 5.83% promised in the renewal application. This shortfall was not counterbalanced by the broadcast of 2.36% public affairs—only 0.83% more public affairs programming than the 1.53% it had promised. We conclude that West Coast did not maintain the promised level of non-entertainment programming prior to July 1972. Moreover, such initial substandard performance calls into question West Coast's good faith in first makin the programming proposal.

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news and public affairs programming during the 1971-1974 license term:

Months	News (In Hours and Minutes)	Public Affairs (In Hours and Minutes)
Dec. 1971	7:39 or 1.06%	6:02 or 0.83%
Jan. 1972	4:42 or 0.65%	22:03 or 3.06%
Feb. 1972	6:36 or 0.92%	5:45 or 0.80%
Mar. 1972	5:08 or 0.71%	17:43 or 2.46%
Apr. 1972	3:54 or 0.54%	20:00 or 2.76%
May 1972	7:05 or 1.98%	24:32 or 3.40%
June 1972	7:40 or 1.06%	24:18 or 3.24%
July 1972	3:34 or 0.49%	16:30 or 2.29%
8 mos. Avg.	5:47 0.93%	16:54 2.36%
Aug. 1972 thru Apr. 1974	None	None
May 1974	6:40 or 0.92%	0:00 or 0%
June 1974	6:40 or 0.92%	0:00 or 0%
July 1974	7:40 or 1.06%	5:00 or 0.69%
Aug. 1974	7:20 or 1.02%	1:00 or 0.14%
Sept. 1974	7:00 or 0.97%	0:00 or 0%
Oct. 1974	7:40 or 1.06%	2:00 or 0.28%
Nov. 1974	9:04 or 1.25%	2:00 or 0.28%
7 mos. Avg.	7:26 1.03%	1:30 .19%

We have calculated the percentages on the basis of a 24 hour broadcast day (as represented in Part III of Section IV-A of the 1974 renewal application), and 30 day months. Att. 23. WCM Ex. No. 8.

20. For the months of August 1972 through April 1974, West Coast concedes that no public service programming whatsoever was carried by KDIG. This departure from a firm 1.1% public affairs commitment takes on added significance since (a) no news or "other" non-entertainment programming was proposed, and (b) a specific commitment was made to keep one employee free to produce daily a five-minute public affairs program which would be aired three times daily.

21. Even in the final seven months of the license term, from May through November 1974, KDIG failed substantially (airing only 0.20%) to meet its 1.1% public affairs commitment. Moreover, this shortfall was not compensated by broadcasting non-entertaiment programming in other categories. KDIG aired only 1.03% news, beginning in May 1974, consisting of five-minute broadcasts of news prepared from local newspapers.[24] In sum, West Coast's failure to perform its non-entertainment programming promises was substantial, and the question of good faith becomes a critical factor in the resolution of the promise versus performance issue.

22. *The Good Faith of West Coast's Efforts at Compliance.* West Coast contends that the ALJ erred in finding that it did not make reasonable and good faith efforts

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[24] West Coast's argument that non-entertainment programming from the subsequent license term should be considered must be rejected; our concern here is with KDIG's 1971-1974 license term performance. *RKO General, Inc.*, 35 FCC 2d 100 (1972). *See also* para. 35, *infra*. We also reject the petitioners' argument that KDIG's end-of-term improvements in programming should be totally disregarded, citing *KORD, Inc.*, 31 FCC 85 (1961). Although end-of-term programming does not mitigate serious deficiencies throughout the term, in this instance it was inherent in the proposal that upgrading was expected before the end of the license term. We have, therefore, taken this programming into account, as we shall explain; however, an entirely different question is presented with regard to the reasonableness of KDIG's delay in upgrading.

to carry out its 1.1% public affairs programming promise and to upgrade its programming well before the end of the license term.[25] It argues that its upgrading of programming was intended to be conditioned upon prior conversion to stereo transmission, explaining that when it acquired KDIG, the station was the only monaural FM station in the San Diego market, its transmitter and antenna were antiquated, and its audience share was only 0.5% to 0.6% until the end of 1973. And McCann stated in his written testimony: "I continuously pursued a new stereo transmitter and antenna for KDIG, and they became a reality finally with a new license, increasing power in March, 1974".

23. In our view, the manner in which West Coast reduced KDIG's staff from 1971 to early 1974 does not reflect an intention to keep one employee engaged in the production of public affairs programming as promised. After a series of firings and transfers of personnel to KORJ, KDIG's staff was reduced to only three persons, none of whom could reasonably have been expected to have had the time required to fulfill the 1.1% public af-

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[25] We agree with the ALJ that "the Commission accepted and, in effect, authorized [the reduction], . .". And we agree that the reduction period remained indefinite, since no date was specified for the anticipated programming improvements by either West Coast or the Bureau. However, the amendment and the July 25 letter together are not subject to the interpretation that the reduction was authorized *carte blanche* for the remainder of the license term. It is clear that West Coast promised resumption of normal programming within a reasonable time, and that this promise was accepted and relied upon by the Commission in granting the licensee's first renewal application. Thus, West Coast promised: "It is intended that well before the next license renewal time, [KDIG and KORJ] will be devoting more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs. Att. 2, WCM Ex. No. 8. The Bureau acknowledged this commitment, stating "it is expected that increased programs will be broadcast during the coming renewal period consistent with the proposal." Att. 4, WCM Ex. No. 8.

fairs promise.[26] While McCann asserts that he intended to fulfill this promise and that he did not know that promise was ignored for 21 months of the term,[27] he also testified that it was his initial intent to reduce KDIG's staff to one employee[28] and "[t]his one person would program the automation machines each day, service the background music [SCA service], keep tabs on the telephone service bureau, do selling, and compose one news-public affairs program per day".[29] This testimony substantially contradicts the promise in the December 1971 amendment to keep a trained employee engaged in the production of the daily 5-minute public affairs program on which West Coast relied to fulfill the 1.1% promise, and demonstrates a lack of commitment to the professed goal from the outset.

24. McCann is no more convincing as to his intention to upgrade non-entertainment programming well before renewal time, or within a reasonable time. While Visconsi believed that upgrading had been promised within "a brief period", "possible six months"[30] McCann had in mind continuing the 1.1% level of public affairs for "a year or two".[31]

25. KDIG was not diligent in converting to stereo transmission. The Commission granted a construction permit for KDIG to increase power and transmit in stereo in November 1972. However, the authorization was allowed to expire, and reinstatement had to be requested in December 1973. When program test authority

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[26] WCM Ex. No. 8 at 16 et seq., Tr. 571-73, 648, 657.

[27] Tr. 564-66.

[28] Tr. 574.

[29] WCM Ex. No. 8 at 12-13.

[30] Tr. 157.

[31] Tr. 549.

was granted in February 1974, KDIG had the authority to go on the air with stereo transmission.

26. Turning to KDIG's staffing, no addition was made to KDIG's skeletal staff until April 1974, when a secretary was permitted to attempt production of a series of public service programs for women, and "[a]t least one, perhaps more", of these programs ran in the summer of 1974.[31a] Only as renewal time approached was any effort made to provide a trained employee for the fulltime production of non-entertainment programming. In April 1974, Rick Peters was hired as News/Public Affairs Director, and he produced three five-minute news programs daily except Saturday and Sunday, from newspapers.[32] Neither Peters nor the secretary produced any significant amount of news or public affairs programming and even KDIG's employees considered these efforts a failure.[33]

27. In short, we cannot conclude that West Coast diligently pursued conversion to stereo capability or that, once stereo transmission capability was achieved, staffing improvements followed within a reasonable time. These end of term improvements provided too little in resources and supervision, and came too late to satisfy West Coast's promises to upgrade well before the end of the license term, or within a reasonable time after the reduced programming proposal was implemented. Good faith efforts cannot be found where the licensee does not commit the personnel and resources necessary to carry out programming promises, unless factors beyond the licensee's control prevented it from doing so. West Coast also claims, however, that its substandard performance was determined by the unavailability of necessary funds, and this argument will be considered next.

[31a] *ID.*, para. 26.

[32] *ID.*, para. 19. *See also* Tr. 670-72.

[33] *See e.g.*, WCM Ex. No. 7 at 7.

28. *Whether KDIG's Programming Deficiencies Resulted from Causes Beyond its Control.* West Coast contends that the ALJ erred in rejecting its defense that finances prevented its earlier production of news and public affairs programming.

29. West Coast submitted in evidence balance sheets for the years 1973-1975 which consolidated KDIG's income and expenses with those of KORJ,[34] arguing they should be accepted because they were the only financial records West Coast maintained. West Coast now argues this showing was sufficient because it demonstrates the licensee suffered heavy losses and did not have the financial ability to produce additional public service programming. The consolidated losses for KDIG and KORJ, totaled $107,950 in 1973, $89,851 in 1974 and $184,653 in 1975 (as of May 31 in each year), according to West Coast.

30. West Coast urges that the record establishes that losses for combined operations placed the licensee on the verge of bankruptcy, and it survived only by large infusions of capital from Visconsi and McCann. According to West Coast, McCann testified without being controverted that KDIG was losing money, without regard to the KORJ losses. West Coast then suggests that we should attribute one-half of the combined KORJ/KDIG income to KDIG and one-half the total expenses and conclude that KDIG's losses justified its failure to perform as promised. Given this attribution and citing *Hubbard Broadcasting, Inc.*, 41 RR 2d 979 (1977), West Coast contended at oral argument[35] that a licensee's first concern is the survival of its infant enterprise, and the public interest is better served by permitting a period of limited public service programming with the expectation that the applicant will provide meaningful response to local problems as resources permit.

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[34] WCM Ex. No. 3.

[35] Tr. 900.

31. The record established that KDIG was losing money at the time West Coast acquired it in 1971. Moreover, the Broadcast Bureau concedes that KDIG experienced losses throughout the license term,[36] and we are convinced that this is an accurate assessment. Although McCann believed during the license term that programming deficiencies would be excused if KDIG was not generating a profit, the continuation of operating losses does not excuse the licensee's dereliction. The promise to carry at least 1.1% public affairs throughout the license term was made in light of and despite those losses. In this case, the failure to perform might have been excused by a timely showing to the Commission of an unexpected worsening of KDIG's finances, or other circumstances beyond its control affecting its ability to perform. West Coast, however, has not shown mitigating circumstances of that nature, and even such arugments as it has made in attempted mitigation have been tendered in a tardy rather than timely fashion.

32. The record evidence indicates that West Coast allocated the bulk of its available funds to KORJ for facilities improvement and staffing.[37] Given the disparity in alloca-

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[36] Tr. 891.

[37] The disparity in West Coast's allocation of resources for the development of the respective stations' physical plants is marked and substantial. Immediately after acquisition of KORJ at Garden Grove, Visconsi approved expenditures to acquire a new transmitter, antenna, studio and production equipment for KORJ. Tr. 555-7; WCM Ex. No. 1 at 1-5. By contrast, KDIG's studio/office lease was not renewed. Instead, McCann testified, he moved KDIG into two motel rooms converted into ". . . a small office which could accommodate three desks in one half, and in the other half, divided by a see-through section of glass, which was an impediment to operations, an equipment room [was located] which could accommodate an engineer's workbench, the automation and background music equipment, and a small newsroom. The newsroom was so small that it almost literally was constructed around a chair". WCM Ex. 8 at 12 et seq. *See also* I.D. Finding 15. Remote control apparatus was installed in a telephone answering service to moni-

tion of resources, West Coast's reliance on a financial showing that commingled KORJ and KDIG revenue and expenses is wholly inadequate; instead it was incumbent on West Coast to show that KDIG's substandard performance was not attributable to a disproportionate allocation of available resources to KORJ rather than a lack of necessary resources to satisfy KDIG's commitment.[38] We concur with the ALJ's insistence on evidence specifically relevant to KDIG's financial position.[39] West Coast's argument to the contrary ignores the licensing scheme under which each station has a duty to serve as a local outlet

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tor and control KDIG's transmitter and meters, 24 hours per day. WCM Ex. No. 8 at 11-13. It was therefore KDIG which bore the brunt of these economic decisions in regard to facilities, not KORJ. Similarly, disparate treatment of KDIG appears with regard to staffing. While KDIG's staff was reduced to three, there is no indication KORJ suffered similar personnel reductions. *See* WCM Ex. 8; at 16 et seq. WCM Ex. No. 7 at 305.

[38] To the contrary, McCann testified that the "infusions of capital" were the principal source of funds for keeping the stations on the air and improving the physical plant: Throughout all of the time through the end of 1975 KDIG was still losing substantial amounts of money and Mr. Visconsi was continuing to furnish cash, and I was paying out expenses, to keep both operations going as best we could . . . . WCM Ex. 8 at 34. Mr. Visconsi and I made an arrangement whereby I could draft on his personal checking account and wire and transfer the funds to the bank account of West Coast Media . . . I might decide that I would only take $5,000 and a week later, take another $5,000, so that the furnishing of the funds by Mr. Visconsi, by that process . . . occurred probably twice a month . . . until well past the license period. Tr. 560-61.

[39] This factor alone distinguishes *Hubbard Broadcasting, Inc., supra*, relied upon by West Coast, and renders it inapposite. In *Hubbard*, the licensee, a UHF television station had claimed and supported an overall loss for the particular station at issue during its operating history. 41 RR 2d 979, 987. Accepting this showing, the Commission found that *Hubbard* had provided "a full and open assessment of its financial condition as it related to its ability to support non-entertainment programming". *Id.* Here, West Coast has failed to make such a station-specific showing for KDIG-FM.

for its city of license and to provide public service programming to its community of license. The citizens of San Diego were ill-served by the deprivation of all public service programming while the licensee was devoting its resources and efforts to improving the market position of the Garden Grove, California station.[40] Therefore, we reject West Coast's effort to treat the two stations as a single, homogenous operation.

33. We conclude from the record as a whole that West Coast has not shown that the delay in conversion to stereo and upgrading public service programming and the total elimination of public service programming for 21 months was not due to the misallocation of resources, rather than a lack thereof, or that the licensee did not have the resources and discretion to satisfy its programming promises had it chosen to do so. Therefore, we conclude that the record indicates the licensee made initial proposals to the Commission which it did not then intend to effect, that with the passage of time the licensee did not make sincere efforts to carry out its proposals, and that it did not convincingly demonstrate that resources were not available to allocate to non-entertainment.

34. We now come to the factors which led the ALJ to "temper that judgment" that the public interest would not be served, "[i]f future performance is to be surmised solely from past performance".[41] These factors were identified as follows. The ALJ stated: neither principal had any broadcast experience when KDIG was acquired in 1971; they did not know what they were getting into; their failure stemmed from ignorance rather than a deliberate attempt to avoid performance; and when reality

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[40] *See City of Camden*, 18 FCC 2d 412, 421, n.21 (1969); *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969); *Minshall Broadcasting Co.*, 11 FCC 2d 796 (1968); and *Suburban Broadcasters*, 30 FCC 1021, 1022 (1961).

[41] *ID.* para. 62.

intruded they acted reasonably. The ALJ's overall impression was ". . . that the West Coast principals are honorable men who have erred because of ignorance and misjudgments. Experience has dispelled their ignorance, and misjudgments are less likely to occur". For these reasons alone, the ALJ granted the renewal application for a term of one year.

35. In our view, there is simply no justification to give inexperienced broadcasters the advantage of performing below minimal renewal standards for a license term without suffering the same consequences which experienced broadcasters would incur.[42] It is expected that principals entering the broadcast field for the first time will hire experienced managers until they have gained experience, and that their programming obligations will be discharged. In *Office of Communication of the United Church of Christ* v. *FCC*,[43] the court emphasized that a renewal applicant literally runs on its record of performance during the license term. Similarly, in *Citizens Communications Center* v. *FCC*,[44] the court stated that "[i]nsubstantial past performance should preclude renewal of a licensee. The licensee, having been given a chance and having failed, should be through." Given West Coast's proven unreliability, there is no reasonable basis for the ALJ's conclusion that West Coast's performance is not a guide to future performance. The ALJ's conclusion that the principals are "honorable men" is a generalized personal assessment, which in our view is not material to the specific promise versus performance issue which we designated. To the extent this finding reflects on the good faith efforts of West Coast's principal to meet their programming promises it is in clear conflict with the ALJ's other finding and

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[42] *Cf. Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970).

[43] 359 F.2d 994, 1007 (D.C. Cir. 1966).

[44] 447 F.2d 1201, 1213 (D.C. Cir. 1971).

conclusions.[45]. In sum, the grant of the renewal applicant cannot be sustained on the basis stated in the Initial Decision.

36. We have concluded that McCann did not intend to fulfill the programming promises when they were made, and that he and West Coast did not make good faith efforts to carry them out. We have further concluded that West Coast has disregarded programming commitments and ultimately that West Coast has failed to justify the substantial variations from its programming promises contained in the 1971 application as amended. Therefore, we conclude that the public interest, convenience and necessity would not be served by granting West Coast's renewal application. See *WMOZ, Inc.*, 36 FCC 202 (1969) and *Leflore Broadcasting Company, Inc.*, 65 FCC 2d 556 (1977), aff'd No. 78-1677 (D.C. Cir. June 5, 1980).

37. *Issue No. 2—The Programming Responsiveness Issue.* It follows that KDIG's prolonged failure to provide any significant amount of non-entertainment programming reflects a dereliction in the licensee's duty to be responsive to the problems, needs and interests of the community, and could be excused only if the promise versus performance issue had been resolved in West Coast's favor. This conclusion provides an additional basis for the denial of the renewal.

38. *Alleged Misrepresentations.* Petitions and the Bureau, in their briefs and oral presentations, argue that the ALJ erred in denying petitioners' request for the addition of a misrepresentation issue. The focus of the petition was on KDIG's 1974 alternate Composite Week showing. Petitioners asserted that West Coast misstated what had

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[45] The ALJ concluded (I.D. Conclusions 48-51) that West Coast's principals did not make sincere and good faith efforts to live up to 1971 programming representations and he doubted the sincerity of the proposals when made.

actually been broadcast in June 1974. Indeed, it has admitted that a programming schedule for proposed broadcasts in June had been used in May 1974 to prepare the past programming showing.[46] The schedule departed in many respects from what was actually broadcast, and West Coast made no attempt to correct it before filing it in July 1974. The petitioners also asserted that West Coast attempted to mislead the Commission by stating that the June 1974 programming was more typical of its past performance than were the days designated officially by the Commission. The petitioners argue that the official days were more representative in that they showed no non-entertainment programming was broadcast.

39. In the designation order we gave no indication that we had considered and rejected inclusion of an issue to inquire into whether the representations in the Composite Week showing warranted separate inquiry as to candor. However, the ALJ was correct that the principal elements of the petitioners' allegations were before us at the time we considered the designation order, and a close question was presented as to whether he had delegated authority to grant the petition.[47] On balance, we believe the ALJ had reasonable basis for denying enlargement of the issues under the circumstances present here.

40. A different question is presented with regard to KDIG's program logs for the month of June 1974 which the petitioners were able to examine for the first time during discovery procedures. Appropriate findings and conclusions relating to licensee candor could and should have been made with regard to evidence which surfaced in the hearing processes. However, we are not convinced

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[46] Tr. 361.

[47] Footnote 2 in the designation order (61 FCC at 579) indirectly stated that KDIG's logs for the officially designated Composite Week were "later filed with the Commission." In fact, those logs accompanied the application at the time of its submission.

the Initial Decision was deficient in this regard. With the elimination of The Scott Ross Show from the public affairs category, a matter which was clearly within the scope of inquiry here, it is apparent that KDIG's June 1974 performance was substandard and was typical of its performance during the remainder of the license term. While this, too, is a close question we believe that the inclusion of The Scott Ross Show was motivated by a desire to compensate for programming KDIG did not have. However, given our disposition here, we do not believe an independent consideration of the Composite Week showing is necessary with or without enlargment of issues. Therefore, the petitioners' and the Broadcast Bureau's exceptions in this regard are denied.

41. ACCORDINGLY, IT IS ORDERED That the application (File No. BRH-873) of West Coast Media, Inc. for renewal of the license of Station KDIG-FM (now KIFM) at San Diego, California, IS DENIED.[48]

42. IT IS FURTHER ORDERED That West Coast Media, Inc. IS AUTHORIZED to continue to operate the station until 12:01 a.m. on October 4, 1980, to enable the licensee to conclude the station's affairs provided, however, that if the licensee seeks timely Commission reconsideration or judicial review of the decision, it is authorized to continue the operation until thirty (30) days after the final disposition of that appeal.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[48] West Coast holds a subsidiary communications authorization (SCA) to provide a background music service, which is related directly to KDIG-FM's main channel operation. This service may not exist apart from the FM license. *See* Section 73.294(a) of the Rules. Our failure to renew the FM license automatically terminates the SCA.

APPENDIX D

FCC-81-210

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20971

File No. BRH-873

In re Application of
WEST COAST MEDIA, INC.

For Renewal of License of Station KDIG-FM
(now KIFM) San Diego, California

MEMORANDUM OPINION AND ORDER

(Adopted: April 23, 1981; Released: April 30, 1981)

BY THE COMMISSION:

1. Before the Commission is a Petition for Reconsideration of the Commission Decision in this proceeding,[1] filed September 24, 1980, by West Coast Media, Inc. (West Coast).[2]

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[1] 79 FCC 2d 610 (1980).

[2] Other related pleadings are: Opposition to Petition for Reconsideration, filed October 22, 1980, by petitioners to deny, John L. Musselman and Jonathan D. Lewis; Opposition to Petition for Reconsideration, filed October 22, 1980, by the Broadcast Bureau; and Reply, filed November 14, 1980, by West Coast Media, Inc. West Coast has also filed a Petition for Leave to Amend, filed August 1, 1980, in which it seeks to augment the record with a supplemental renewal reflecting the station's performance from 1977 to 1980. Since the time under consideration here is the 1971-1974 license term, no purpose would be achieved by adducing evidence about subsequent licensee performance. In addition, West Coast filed a Request for Oral Argument on April 17, 1981. The pleading is untimely and does not establish good reason for holding further oral argument.

2. In our August 25, 1980 Decision, we denied West Coast's application for renewal of its license to operate station KDIG-FM, San Diego, California. We concluded that West Coast had not substantially carried out, in good faith, representations made in its 1971 renewal application and amendment thereto as to proposed news, public affairs, and other non-entertainment programming. In so concluding, we found that West Coast had failed to establish that its virtual elimination of news and public affairs from May 1972 to April 1974 and gradual recommencement of programs during the remaining seven months at a level below the 1.1% public affairs promised, resulted from a failure to allocate sufficient financial resources to the station. The financial information relied on by West Coast, in a form which commingled the assets and debts of co-owned stations KDIG-FM and KORJ-FM, did not substantially rebut our finding of a misallocation of resources. Evidence of inadequate staffing and a consistent lack of commitment by the principals to a speedy renewal of news and public affairs, we determine, belied West Coast's December 1971 promise temporarily to reduce the levels of news (to 0%) and public affairs (to 1.1%) and to resume "*well before* the next license renewal time . . . devot[ion to] more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs . . . ."[3] Furthermore, we were unable to make a statistically sound finding in favor of West Coast from the past programming data it supplied on the 1974 renewal form, data culled from pre-logs of programs scheduled during an alternative composite week in June 1974. We agreed with the ALJ's decision to remove, as improperly classified, the religious-oriented *Scott Ross Show* from the public affairs category, further reducing the extent of West Coast's compliance. Due to West Coast's substandard performance throughout the license term and lack of

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[3] Att. 2, WCM Exh. No. 8.

good faith efforts to effectuate its programming promises, we denied renewal. In so doing, we overturned the sanction of a short-term renewal granted by the ALJ.

3. West Coast now urges the Commission to reconsider its decision. In support of its request, West Coast argues that: (1) the Commission made impermissible findings of misrepresentation in the absence of a designated character issue; (2) it made errors of fact pertaining to the staffing and financing of West Coast's stations; (3) the Commission imposed an unduly harsh sanction in this promise versus performance case; and (4) the Commission should consider newly discovered evidence attesting to the good faith of West Coast.

4. Many of West Coast's arguments, particularly those regarding the factual basis for our Decision, concern issues which were fully addressed in our Decision and, thus, need not be readdressed. The Commission has a long-standing policy of not granting reconsideration merely to permit reargument of matters already fully considered and passed upon, particularly where, as here, no manifest error has been demonstrated.[4] We shall, however, discuss those arguments which West Coast has either advanced for the first time on reconsideration or which reflect an incorrect reading of our Decision.

5. Contending that this case has "endured the aura" of an undesignated misrepresentation issue,[5] West Coast first takes issue with the Commission's purported refer-

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[4] *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub. nom. Lorain Journal Company* v. *FCC*, 122 U.S.App.D.C. 127, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Nevertheless, we have again reviewed the record in light of the licensee's assertions and find no reason to depart from the basic findings and conclusions contained in our Decision.

[5] Petition for Reconsideration at 3. According to West Coast, this "aura" has persisted despite the fact that both the ALJ and Commission refused to add a misrepresentation issue against it. FCC 77M-1128, released June 28, 1977, and Decision, paras. 38-40.

ence to its candor in stating that the license "did not intend to fulfill the programming promises when they were made."[6] This conclusion, it asserts, is unquestionably a conclusion that West Coast was guilty of misrepresentation. In its Reply, West Coast elaborates, arguing that since it was never apprised that a misrepresentation issue would be addressed, the Decision, which allegedly relies on findings of misrepresentation, is fatally flawed on due process grounds.[7] Admitting that the wording of its programming commitment in the 1971 amendment was "plainly inartful", West Coast claims it could have shown the "proposal, nonetheless, was made in good faith" had its intent been the subject of a designated issue. Thus, as new matter, West Coast now submits evidence that Mr. McCann took several steps to assure a workable programming plan, including consulting with experienced broadcasters and equipment suppliers, as proof of McCann's sincerity.[8] Finally, West Coast suggests that a

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[6] Decision, para. 36. West Coast also objects to a similar statement that "the licensee made initial proposals to the Commission which it did not then intend to effect." *Id.* at para. 33. It also takes exception to the ALJ's conclusion that the 1974 renewal application was "inherently misleading" (I.D., para. 50), a conclusion drawn after the ALJ refused to add a misrepresentation issue.

[7] West Coast also asserts that although the Commission concluded that it would not add an issue inquiring into the circumstances surrounding its 1974 composite week showing, it was error for the Commission to have suggested that the ALJ should have made conclusions as to the candor of the licensee in connection with evidence produced in the hearing process. West Coast does not raise a significant exception in this regard. We made no adverse findings or conclusions as to West Coast's candor either in relation to its composite week showing or the submission of KDIG's June 1974 program logs. Rather, our denial of renewal was based on the overwhelming evidence of insubstantial programming performance and the licensee's lack of good faith efforts to meet its promises.

[8] West Coast also contends that the Commission misread the record regarding a promise in the 1971 amendment to hire an employee to gather news as one of several, not singular, duties, and the

determination that a licensee has failed to carry out its programming promises in good faith cannot be made in the absence of a misrepresentation issue. In support of this proposition, West Coast points to a promise versus performance case ending in non-renewal. *Leflore Broadcasting Company, Inc.*,[9] which, in contrast, contained both promise versus performance and misrepresentation issues and resulted in the finding, similar to the one found here, that "Leflore never intended to honor the pledges it made in 1970." [10]

6. West Coast's argument that it did not have notice that the question of whether it had carried out its programming promises with the requisite intent was in issue may be readily rejected. The promise versus performance issue, as designated, reads as follows: "To determine whether West Coast Media, Inc. made reasonable and *good faith* efforts to carry out its non-entertainment programming proposal as set forth in its 1971 application for renewal of license . . . ." (Emphasis added). Given the express terms of the issue, we cannot agree that licensee faced unfairness or undue surprise at the hearing by the adduction of evidence concerning, or our consideration of its intentions surrounding the submission of the December 1971 programming amendment. To the

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circumstances surrounding the submission of its 1974 composite week showing, suggesting it would have presented its case differently had an appropriate issue been designated.

[9] 65 FCC 2d 556 (1977), *aff'd*, 636 F.2d 454 (D.C. Cir. 1980). The court stated at p. 460 with respect to its discussion of misrepresentation and lack of candor, "In part, (the ALJ's) conclusion ['that LeFlore's 1970 renewal application [was] replete with misrepresentations'] was an extension of his determination that Leflore had failed to make a good faith effort to carry out its 1970 programming representations." It went on to state that "the finding that Leflore and Dixie *never intended*, to fulfill their programming promises necessarily entails the corollary finding that they intended to deceive the Commission." *Id.* at 462.

[10] *Id.* at 460.

contrary, Mr. McCann had ample opportunity to explain his intentions and efforts in 1971 and indeed testified in part in this respect: "It seemed inconceivable that we could not within say, a year or two at most, have economically improved the station to the point where we could afford again to do a substantial amount of news and public affairs programming—other non-entertainment programming." [11] Given the adequacy of notice and the opportunity to introduce evidence on this issue, there is no basis for granting West Coast's request to introduce further evidence of Mr. McCann's intentions and activities in 1971 at this late stage of the proceeding.

7. To the extent our Decision referred to the licensee's intent, we did not mean to suggest that our inquiry focused on anything but the licensee's reasonable and good faith efforts to adhere to its promises.[12] Our review properly centered on West Coast's "duty to carry out substantially the programming policies embodied in its proposal", or in the alternative to justify to the Commission why there has been substantial departure therefrom.[13] As part of that good faith effort, "the applicant must *conscientiously* seek to carry out those proposals, which he found, and finds, serve the public interest needs of his community." [14] Quite simply, the record evidence submitted by West Coast and selected portions repeated in its present petition fail to reveal the requisite consci-

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[11] Tr. 549.

[12] We disagree that a finding of lack of good faith is necessarily tantamount to a finding of misrepresentation. Rather, it may involve a number of states of mind ranging from indifference to specific intent to deceive, as found in *Leflore Broadcasting Company, Inc., supra.* The determination as to state of mind is one which can only be based on the particular factual circumstances of a case.

[13] *KORD, Inc.*, 31 FCC 85, 86 (1961).

[14] *Id.* at 89.

entious effort.[15] As the petitioners correctly argue, rather than an alleged due process violation, "the actual problem is WCM failed to meet the burden of proof on the designated promise versus performance issue and the responsive programming issue." [16] Overall, the record indisputably showed a lack of compliance by West Coast throughout the license term.

8. In sum, the record evidence on this issue establishes that West Coast consistently failed to keep either its original or amended promises of performance. West Coast has not shown that there is any basis for altering our conclusions in this regard. We underscore that our Decision rested on findings of West Coast's lack of reasonable and good faith efforts to fulfill its commitments, and not on findings of misrepresentation.[17]

9. In its request for reconsideration, West Coast again argues that the variations from its promised performance can be justified because of a lack of financial resources, a circumstance allegedly beyond its control. In so arguing, West Coast no longer relies on its previous argument that we should attribute one half of the combined KORJ/KDIG income and one half of the total ex-

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[15] The last minute affidavit of 1972-73 station employee, William Duna, submitted by West Coast, is untimely and unpersuasive. *See* 47 C.F.R. 1.106(b)(ii). West Coast, in due diligence, could have presented this information in a pleading during the years 1977 through 1980. The affidavit, consisting primarily of hearsay as to Station Manager Fortner's attendance at public functions, does not affect our disposition of West Coast's application.

[16] Petitioners Opposition at 2.

[17] West Coast nowhere contests our conclusion under the programming responsiveness issue that it was derelict in its responsibilities to the community. The petitioners in their Opposition argue that this conclusion constitutes an independent ground for denial of renewal in this case. Opposition at 8. We need not reach this question since we have determined that West Coast failed to meet its burden of proof on both the promise versus performance and programming responsiveness issues.

penses to KDIG and conclude that KDIG's losses justified its failure to perform as promised. It has revised its argument, asserting now that the large cash outlays for KORJ were made before the acquisition of KDIG and that it was only after the acquisition that it realized that its financial planning was unrealistic and at that point it made "even handed" cutbacks at both stations.[18] In light of the financial difficulties which plagued both of its stations, West Coast again argues that the Commission erred in not adhering to the policy established in *Hubbard Broadcasting, Inc.*[19] which excused similar promise versus performance discrepancies at a fledgling UHF station.[20] As a related matter, it argues that it was illogical for the Commission to fault West Coast for the failure to make a specific showing of KDIG's losses when it earlier had recognized that KDIG suffered losses throughout the license term.

10. West Coast's argument that its failure to perform was due to financial circumstances beyond its control because its major cash outlays for KORJ were made before the acquisition of KDIG may be rejected on two grounds. The first is lack of substantiation. West Coast's references to exhibits either are irrelevant to or simply do not support its assertion that it made even-handed cutbacks at both facilities as a result of their dire financial straits.[21] In any event, even if the factual proposition

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[18] Petition for Reconsideration at 9 and 10.

[19] 41 RR 2d 979 (1977).

[20] For the first time in its Reply, West Coast submits financial data attesting to the precarious nature of independent FM stations nationally from 1971-1976. West Coast also cites Section 0.281(a)(8)(I) of the Commission rules which prescribe slightly lower processing guidelines for non-entertainment programming for FM's than that for AM stations as evidence that the Commission has recognized the need for special treatment for FM stations similar to the special treatment accorded UHF stations.

[21] *See* WCM Exh. 8 at 7 and Exh. 5 at 2, cited in West Coast's Petition for Reconsideration at 10.

were established, it is clear that the acquisition of a station for which there was no realistic financial planning is a voluntary business judgment and, hence, a circumstance within the control of West Coast. Aside from this line of argument, West Coast's arguments about the significance of the *Hubbard* decision [22] and its financial resources and outlays are virtually a reiteration of its version of the facts and law urged in its Exceptions to the Initial Decision. As a result, there is no basis for failing to adhere to our conclusion that West Coast has failed to sustain its burden of justifying the substantial variations from its programming promises at station KDIG.

11. In the event the Commission adheres to its findings on the central issue, promise versus performance, and rejects West Coast's finacial hardship arguments, West Coast urges that past precedent mandates a less harsh sanction where, as here, no misrepresentation issue was designated. *Cf. Leflore Broadcasting Company, Inc., supra.* West Coast cites examples of more moderate penalties including short-term renewals *e.g., KORD, Inc., supra; WSER, Inc*; [23] *Rust Craft Broadcasting of New York, Inc.*; [24] and the imposition of quarterly reports, *Associated Communications Corp.*[25] West Coast asserts that it has been the Commission's policy in more egregi-

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[22] West Coast's references to the similarity between the economic conditions facing the UHF station in *Hubbard* and KDIG-FM are overdrawn. The Commission has stated in a considerably less egregious promise versus performance case, "The licensee is reminded that the fact that KJAZ is a small, independent FM station does not excuse it from adhering to this basic principle (of adhering to its program proposals)." *Patrick Henry*, 59 FCC 2d 1204, 1215 (1976).

[23] 29 FCC 2d 441 (1971).

[24] 54 FCC 2d 1222 (1975).

[25] 71 FCC 2d 1353 (1979).

ous, non-promise versus performance cases to reject non-renewal as an appropriate administrative tool.[26]

12. In our Decision, we clearly explained the basis for denying renewal in light of the facts of the case and the reasoning of *Citizens Communication Center* v. *FCC* that "(i)nsubstantial past performance should preclude renewal of a license. The licensee, having been given a chance and having failed, should be through."[27] Even if we were to agree with West Coast that proceedings where we imposed lesser sanctions are apposite here, we would still not be prohibited from denying West Coast's renewal application. As recently repeated in *Walton Broadcasting, Inc.*:

> It is well settled that the Commission has wide discretion in determining the appropriate sanction to be applied for licensee misconduct . . . . The [Supreme] bound to deal with all cases at all times as it has dealt with some cases that seem comparable. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946). The Court of Appeals has stated that the choice of remedies and sanctions is a matter within the Commission's broad discretion and found no abuse of discretion where the Commission imposed a sanction

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[26] In sharp contrast to this Decision, it argues, the Commission has considered the expectation as to a licensee's future service and reputation to grant renewal in the face of more serious derelictions such as longstanding fraudulent billing, *WJPD Broadcasting Co.*, 78 FCC 2d 788 (1980). Unlike those cases, this proceeding reveals a consistent pattern, extending over a substantial portion of the license term, of the owners' failure to adhere to Commission requirements. Moreover, unlike the corrective measures taken in *WJPD* and *Janus*, West Coast's belated attempts to broadcast news and public affairs are not sufficient to persuade us that renewal would be in the public interest. The licensee's entire broadcast record is the best indicator of its future performance. *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

[27] 447 F.2d 1201, 1213 (D.C. Cir. 1971).

more severe than previously imposed. *Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied, sub nom. WWIX, Inc.* v. *FCC*, 383 U.S. 967 (1966)." [28]

The instant Petition for Reconsideration contains no new facts or arguments which cause us to question our legitimate exercise of discretion in denying KDIG-FM's renewal.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed by West Coast Media, Inc. on August 1, 1980, IS DENIED.

14. IT IS FURTHER ORDERED, That the request for Oral Argument filed by West Coast Media, Inc. on April 17, 1981, IS DENIED.

15. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed by West Coast Media, Inc. on September 24, 1980, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[28] 78 FCC 2d 857, 868 n.17 (1980). *See also Leflore Broadcasting Company, Inc., supra* note 9.

APPENDIX E

F.C.C. 76-985

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20971

File No. BRH-873

In Re Application of
WEST COAST MEDIA, INC.

For Renewal of License of Station KDIG-FM,
San Diego, California

MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY

(Adopted: October 21, 1976;

Released: November 5, 1976)

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONER HOOKS DISSENTING; COMMISSIONERS FOGARTY AND WHITE NOT PARTICIPATING.

1. The Commission has before it for consideration (i) the above-captioned application for renewal of license for Station KDIG-FM, San Diego, California, filed July 31, 1974 by West Coast Media, Inc. (licensee or applicant); (ii) a petition to deny the application timely filed, November 1, 1974 by Jonathan D. Lewis and John B. Musselman; (iii) a motion to strike, and an opposition to the petition to deny, filed November 29, 1974; (iv) an opposition to motion to strike and reply to opposition, filed December 24, 1974; and (v) various related pleadings.[1]

[1] Additional pleadings concerning this matter include: an amendment to the instant renewal application, received August 2, 1976, filed in response to a staff inquiry dated July 13, 1976; and re-

2. Initially, licensee challenges petitioners' standing to file the instant petition. However, we find that Lewis and Musselman were both residents of the San Diego area during the license term and, thus, have standing to file the petition pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended. *Hale* v. *FCC*, 425 F.2d 556 (1970).

3. In its opposition, as well as its motion to strike, the applicant alleges that the petition is deficient because it is not supported by proper affidavits. Specifically, licensee avers that the affidavits attached to the petition only attest to the truth of the statements contained therein to the best of the affiant's knowledge. In response, petitioners assert they have submitted proper affidavits with the petition to deny, certifying that all statements therein are true and accurate to the best of their knowledge.

4. Section 309(d)(1) of the Communications Act of 1934, as amended requires, *inter alia*, that:

> The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with [the public interest]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

Here the petition is supported by affidavits executed by petitioners which certify to the truth of the statements contained therein. We have reviewed these affidavits and, in our view, they comply with the requirements of 309(d)(1). Therefore, the motion to strike shall be denied.

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sponsive comments as well as an amendment to the petition, filed August 23, 1976.

Ascertainment

5. While petitioners initially questioned KDIG's ascertainment, they subsequently withdrew their allegation that the survey of community leaders was not properly conducted (amendment to petition, p. 1), and, in any event, state that their concern is with the programming broadcast to meet community needs rather than the ascertainment itself. Examination of KDIG's 1974 renewal application and the pleadings show that licensee complied with the requirements of our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). Accordingly, no issue is raised concerning KDIG's ascertainment. We shall treat *infra* petitioners' charges regarding licensee's programming broadcast to meet the needs and interests of the San Diego community.

Remoteness of Management

6. Next, petitioners allege that the station's two owners do not live, nor spend significant amounts of time in San Diego. They also assert that none of the persons who work full-time at KDIG are involved in programming decisions in a significant way. In opposition, licensee argues that there is no requirement that the shareholders or officers reside in the city of license. Furthermore, the applicant states that all of the station's managers have lived in the KDIG area. We concur with the position of the licensee in this regard. Our concern at renewal time is that each licensee operate its station in the public interest and not with the residency of its shareholders, officers or employees. Petitioners have not shown how the residency of any person connected with the station created deficiencies in its operation.

KDIG's Past Programming

7. Petitioners allege that KDIG failed to perform as it had promised in its 1971 renewal application. In this

regard, they assert that in a December, 1971 amendment to its application the station proposed 0% news, 1 hour, 45 minutes of public affairs programming (1.1%), and 0% "all other programs, exclusive of entertainment and sports." However, petitioners note, the licensee stated in the same amendment:

> It is intended that well before the next license renewal time both stations will be devoting more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs, and that the same will be well done, and will be an important and significant service to the public not otherwise available.

Petitioners maintain that until May of 1974, KDIG broadcast no news, no religious or instructional programming, and little public service programming. They argue that the public service programming which the station did broadcast was in the form of 30 second announcements, occupying less than 1% of KDIG's total broadcast time. Petitioners indicate that program logs for the composite week (as designated by the Commission) show that KDIG broadcast 0% "other" programs.[2] Petitioners state that KDIG has substituted a breakdown for June, 1974, which it proposed as an "alternate composite week," without stating why the composite week program logs were not representative of its past programming.[3] In addition,

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[2] The program logs for the composite week, which were later filed with the Commission after a request from the staff, showed 0% news, 0% public affairs, and 0% "other."

[3] FCC Form 303, Part II 3.B. See also exhibit 7 attached to KDIG's 1974 renewal application. According to Exhibit 7, the alternate composite week consisted of .694% news, 5.090% public affairs and 1.190% "other" programming. In this regard, while the renewal application specified an alternate month to be used if the composite week was not representative, it appears that KDIG used an alternate week, instead of a month. See Exhibit 7 of KDIG's 1974 application.

petitioners state that of the public service announcements broadcast 47.7% were aired between 12 midnight and 6 A.M. and few involved local organizations.

8. Next, petitioners argue that none of the programs listed in exhibit 8 as programs broadcast during the previous year meeting the needs and interests of listeners, were broadcast before May of 1974. In this regard they allege that the *Speech Is Freedom* program was never broadcast and the *Great Escape* was discontinued. Furthermore, petitioners assert that the *Great Escape* was broadcast four times, 15 minutes each, on Mondays, not Monday through Friday as stated by KDIG. In addition, with respect to the *Scott Ross* program, petitioners contend that it has been misrepresented as public affairs programming, since it is actually 70-80% current musical selections, usually with a Christian message. They state that Scott Ross' ad libs concern Christianity and ask listeners to call in on "love lines." Petitioners aver that the program, which represents the greatest portion of the station's public affairs programming, is not locally produced, and there are no guests on the program. Petitioners consider the correct breakdown for the June 1974 "alternate composite week" to be: news—1 hour and 10 minutes (.694%), public affairs—1 hour (.595%), religion—5 hours (2.97%) with no additional "other" programming.

9. In opposition, licensee maintains that the Commission accepted its reduced news and public affairs proposal, made in 1971, on the basis that such programming would increase as the station's economic situation improved.[4] Furthermore, the applicant states regarding its news and public affairs programming:

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[4] The applicant cites a Commission letter dated July 25, 1972, which responded to the licensee's December, 1971 amendment. The letter included the following: "While we are not asking for additional information concerning the reduction in programming it is expected that increased programs will be broadcast during the coming renewal period consistent with the proposal."

> KDIG has broadcast since acquired by West Coast Media, Inc. over 248 hours of News and over 361 hours of Public Affairs—a total of more than 609 hours—and during this license period over 98 hours of News and over 240 hours of Public Affairs will have been run—a total of over 338 hours, or 1.28%.

Licensee states that the increase in news and public affairs programming was the result of improved signal, ratings, and its economic situation, and not an attempt to upgrade for the renewal. Additionally, the applicant asserts that public service announcements (PSAs) have been scheduled twice an hour for a total of 1.66% of KDIG's total broadcast time since 1972. KDIG maintains that in June of 1974, 24 of 47 PSAs were broadcast or aired for local organizations. Licensee contends that the *Speech Is Freedom* program has been broadcast as indicated in the renewal application. With respect to the *Great Escape* licensee indicates that "between the date of transmittal of that information to the Cleveland office, where the application for renewal was processed, and the date of the filing of the 'Petition to Deny,' the program was discontinued and not run Monday thru Friday as anticipated because Mrs. Alison LaPenn was "unable to develop sufficient material." Concerning the *Scott Ross* program applicant urges that it contains between 50-75% discussions concerning a number of topics (listed in the Opposition, at page 18) and including a number of guests (also listed in the opposition). Finally, KDIG does not dispute petitioners' claim that the programs listed in exhibit 8 were not broadcast prior to May 1974, but insists that this did not amount to upgrading, but as has been previously mentioned, the result of an improved economic situation.

10. In their reply, petitioners allege they monitored KDIG for a continuous six-day period from May 23-28, 1974 (during 82% of the station's broadcast day). They maintain that the program *Speech Is Freedom*, which was

to be broadcast 5 times per day, was not broadcast during the times which the licensee claims it was broadcast (or at any other times during the recorded period). Petitioners also question the method used by KDIG to determine its alternate composite week, noting that the *Great Escape* was never broadcast more than one time per week, whereas it is listed in exhibit 8 as having been broadcast Monday-Friday. Concerning the *Scott Ross* program petitioners disputed its characterization as a public affairs program, arguing that it should be considered religious programming. Petitioners attach an analysis of the program (exhibit E) based on information from the actual broadcast of the program. Petitioners also argue that the composite week logs are "illegal" because they show only the hour in which an event was broadcast, station IDs are not shown, many commercials are not identified as to the sponsor, promos are logged as PSAs, and times and names of programs are not shown.

11,. In response to a Commission letter, dated July 13, 1976, concerning the station's past programming, West Coast Media, Inc. acknowledged that the Commission had been misinformed with regard to KDIG's programming during the alternate composite week. It states that an examination of the actual logs, rather than the scheduled logs, which had been originally used, shows that programs listed as being broadcast had not been broadcast as scheduled. Thus, the figures listed for the alternate composite week were not correct. According to KDIG, public affairs programming during the month of June should have included: 15 hours for the *Scott Ross* program, 1 hour 15 minutes for the *Great Escape* and a total of 62 minutes for *Speech Is Freedom.* The total public affairs programming, according to the station, amounted to 17 hours and 17 minutes of programming for the entire month of June. In addition, *Speech Is Freedom* commenced April 29, 1974 and terminated December, 1974; the *Great Escape* commenced June 24, 1974 and terminated August 5, 1974; and *Scott Ross* commenced May

5, 1974 and terminated August, 1975. The *Scott Ross* program and *Speech Is Freedom* were replaced by other programming but apparently no replacement was made for the *Great Escape*. During the period July thru September, 1974 KDIG states that 3 hours and 55 minutes were devoted to public affairs programming (3 hours per week beginning the controversial *Scott Ross* program).

12. In response to licensee's amendment, petitioners filed comments and an amendment to their petition to deny on August 23, 1976. First, petitioners charge that KDIG did not provide reason for the Commission to accept its alternate composite week as being representative of its programming, and that if an "alternate composite week" would be acceptable licensee has failed to choose a representative month and instead chose a representative week. (See note 3, *supra*). Petitioners also allege that KDIG's listing of programs broadcast after December 1974 is not relevant to the instant renewal application. Moreover, petitioners aver that despite applicant's claim that a former employee apparently forwarded incorrect information to be used, "scheduled" logs rather than "as run" logs, no program scheduled separate from the logs exists. Furthermore, petitioners question licensee's sincerity, urging that this license has been in dispute since 1974 and now two years later the station finally recognized a mistake in its calculations, which it should have been aware of originally. Petitioners also offer an affidavit executed by Rick Peters, News and Public Affairs Director of KDIG from April 8, 1974-October 16, 1974. He attests that during the time he was employed, only one broadcast was made by any person as part of the program *Speech Is Freedom*, and that he was unaware of any "program schedule" separate from the program log.

13. It is well established that broadcasters are given wide discretion in determining the community problems they will meet and the substance of the program to meet

them. *Stone* v. *FCC*, 466 F.2d 316 *reh. den.*, 466 F.2d 331 (D.C. Cir. 1972). Furthermore, a licensee has broad discretion to adjust its programming to meet the changing needs and interests within its service area, as well as to its own fluctuating circumstances. *Vogel-Hendrix Corporation*, 58 FCC 2d 495, 499; *The Evening News Association*, 35 FCC 2d 366, 391 (D.C. Cir. 1972). However, the representations made in a renewal application must be such as to permit Commission reliance on them, *KORD, Inc.*, 31 FCC 2d 85 (1961). Finally, we have made clear that "evidence of upgrading toward the end of, or after, the license period must be discounted and will be given little weight in a renewal proceeding where the applicant's performance during the license period was seriously deficient. *KORD, Inc.*, 31 FCC 2d 85 (1961), *Evening Star Broadcasting Co.*, 27 FCC 2d 316 (1971), affirmed sub nom. *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972)." *Alabama Educational Television Commission*, 50 FCC 2d 461, 476 (1975).

14. We are confronted, here, with numerous allegations and counter-allegations regarding the content and the amount of broadcast time devoted by the licensee of KDIG to non-entertainment programming during the past license period. As demonstrated by the discussion herein, the record is confused and unclear as to the precise amount of time devoted by this licensee to such programming. In fact, the Commission was forced to require further explanation from licensee in August of this year concerning the nature and extent of programming broadcast during the station's "alternate composite week" and licensee, for the first time, responded that it had erred in computing its alternate composite week. However, the record before us suggests that the licensee failed to broadcast any news, public affairs or "other" non-entertainment programming other than a number of PSAs until the very twilight of its past license term, justified by an alleged lack of financial resources. In this regard, as noted in paragraph 11, *supra*, the licensee began broad-

casting public affairs and "other" programming in late April 1974, approximately two months prior to filing its license renewal application for KDIG. Thus, it appears that KDIG failed to broadcast significant non-entertainment programming until the station was approximately two and one half years into the past license period.[5]

15. We have previously held that evidence of improved performance may in some circumstances be advanced by a renewal applicant as evidence of his willingness to correct deficient license term performance. *Alabama Educational Television Commission, supra.* However, in this instance licensee discontinued all of its alleged public affairs program subsequent to the filing of the renewal application and replaced only two of them. Moreover, licensee has admitted that the figures submitted with regard to its alternate composite week are inaccurate and, thus, add little to our resolution of this case.[6] In short, licensee has not shown that any month, other than the composite week as designated by the Commission, is representative of licensee's performance during the license term and the composite week shows that applicant broad-

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[5] In our view, licensee's failure to provide such programming until far into license period may not be viewed as having been approved by the Commission in its letter of July 25, 1972 (see note 4, *supra*). While the Commission considered licensee's proposal to broadcast 0% news, 1.1% public affairs and 0% "other" programming during the 1971-1974 license period, the Commission also relied upon licensee's representation to "devote more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs, and that some will be well done, and will be important and significant service to the public not otherwise available." We believe that more was expected of this licensee than beginning its broadcast of non-entertainment programming two months prior to filing its 1974 renewal application.

[6] In this connection, the record still is not clear as to the methods employed by licensee in computing its alternate composite week or whether the material contained in KDIG's renewal application concerning its alternate composite week encompasses an actual composite week or a full month.

cast 0 news, 0 public affairs, and 0 "other" (see amendment, filed 9/17/74). It appears that despite licensee's promises to raise the level of its public affairs programming during the license term, it failed to do so until the final weeks of the license term.

16. In light of the above, we believe that a substantial question has been raised regarding the licensee's promise in its 1971 renewal application to devote "more than just an adequate or minimum amount of time to news, public affairs, religious and instructional types of programs . . ." and its actual performance during the past license period. In our view, the record in this proceeding discloses that there is a substantial variance between licensee's promises and actual performance which is not adequately explained.[7] Therefore, this matter must be fully explored at hearing and an appropriate promise versus performance issue will be specified. Furthermore, licensee's official composite week showing of no non-entertainment programming (see paragraph 7, *supra*) together with the fact that little, if any, non-entertainment programming was broadcast until the final months of the station's license period (see paragraph 8, *supra*) raise a substantial and material question regarding the responsiveness of KDIG's programming to the problems, needs and interests of its community of license during the 1971-1974 license period. This issue, also, must be fully explored in hearing and an appropriate issue will be specified.

Technical Violations

17. Next, petitioners question licensee's ability to operate its station in the public interest based on numerous technical violations. Specifically, on August 20, 1974 the

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[7] In this regard, the *Scott Ross* program appears to represent a substantial portion of the public affairs programming broadcast by KDIG. Therefore, we believe that the resolution of the conflict regarding the proper classification of this program should be made in the evidentiary hearing ordered herein.

Engineer in Charge from our field office in San Diego conducted an inspection of KDIG-FM. The inspection revealed non-compliance with 18 Sections of the Commission's Rules and Regulations including: operating with a power less than 90% of the authorized operating power of 9.5 KW on numerous days; operating with a power greater than 105% of the authorized power during a period subsequent to granting a construction permit, but prior to granting of program test authority on numerous days; failure to retain station logs for a period of two years including program logs, operating logs, and maintenance logs; failure of the station employee(s), having actual knowledge of the facts involved, to sign the program logs when starting duty, and again when going off duty; failure to enter into the operating logs the time daily checks of tower lights were made; and the assignment of other duties to the operator on duty such as to interfere with the proper operation of the transmitter and keeping of required logs. An Official Notice of Violation was issued on September 27, 1974. A further inspection of Station KDIG was conducted on October 30, 1975 and an Official Notice of Violation was issued on November 10, 1975. The Notice of Violation reveals two violations of Commission Rules that were also included in the prior Notice—i.e., failure to have a properly licensed operator on duty at the remote control point (Rule 73.265(a)) and assigning other duties to the operator on duty such as to interfere with the proper operation of the transmitter and keeping of required logs (Rule 73.265 (g)). The station was cited, *inter alia*, for failure to have a properly licensed operator make the required entries in the operating log.

18. By letters, filed with the Commission October 15, 1974 and November 24, 1975 in response to the Official Notices of Violation, the licensee advised the Commission that local management had been instructed to take steps to prevent future violations.

19. KDIG's record of violations and our review of those violations, along with the licensee's responses thereto, raise questions concerning the licensee's technical qualifications to operate Station KDIG. In this regard, we note the repeated violations of Section 73.265(a) of the Rules as well as the continuous nature of the station's noncompliance with 73.265(g). The seriousness of these violations, their continuous pattern, and licensee's failure to prevent violations of our technical rules raise a substantial question as to West Coast Media, Inc.'s technical qualifications to remain a licensee. Moreover, a question has been raised by the facts herein as to West Coast Media's ability to exercise adequate control or supervision over the station to insure its operation in the public interest. See *Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975); *Voice of Charlotte Broadcasting Co.*, 57 FCC 2d 1275 (1976). In view of the foregoing, the Commission is unable to determine that the public interest would be served by a grant of the instant renewal application and an evidentiary hearing on this issue is required.

20. Additionally, in light of the facts recited in paragraph 17, *supra*, we have determined that West Coast Media may be subject to a forfeiture pursuant to Section 503(b)(1)(A) and (B) of the Communications Act for apparent or willful or repeated violations contained in the Commission's November 10, 1975 Official Notice of Violations.[8] Accordingly, this Memorandum Opinion and Order also shall constitute a Notice of Apparent Liability for Forfeiture pursuant to Section 503(b)(2) of the Communications Act. Because this matter has been designated for a full evidentiary hearing, the licensee will have full opportunity in that forum to address itself to all matters referred to in this Notice of Apparent Liability, and the Commission will be able to determine whether they have, in fact, been willful or repeated violations of the Rules,

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[8] In this regard, we note that one year statute of limitation specified in Section 503(b)(3) of the Communications Act has not yet expired with respect to these violations.

and whether, if the licensee is found liable, an order of forfeiture in the amount of $10,000 or some lesser amount should be issued.

Rule 1.526 Violation

21. Petitioners assert that on December 11, 1974 Mr. Pat Walden, station manager, denied them access to KDIG's public file (see reply, ex. V). It is alleged that complainants had previously been informed by Walden that the owners of the station had instructed him to refuse petitioners access to the station's public file (see reply, ex. C). We have also been informed by complainants that their complaint against the station in this regard should be considered "resolved" as the station has agreed to permit petitioners to inspect the public file of KDIG. In this regard, Section 1.526(d) of the Commission's Rules provides:

> The file shall be maintained at the main studio of the station, or at any other accessible place . . . in the community to which the station is or is proposed to be licensed, *and shall be available for public inspection at any time during regular business hours.* (emphasis supplied).

See also *Availability of Locally Maintained Records for Inspection by Members of the Public*, 28 FCC 2d 71 (1971). On the basis of the information before us, it appears that the licensee did deny petitioners access to its public file in violation of Section 1.526 of our Rules. We do not believe, however, that this isolated incident requires further consideration at this time. *Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52 (1972); see also *California Stereo, Inc.*, 38 FCC 2d 1003 (1973). However, we must remind licensee of its responsibility to make any necessary arrangements to have its public file available at all times during its regular business hours, and we caution KDIG against any further infractions of this rule.

22. Accordingly, IT IS ORDERED, That licensee's motion to strike the petition, filed November 29, 1974, IS DENIED.

23. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned application IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine whether West Coast Media, Inc. made reasonable and good faith efforts to carry out its non-entertainment programming proposal as set forth in its 1971 application for renewal of license for Station KDIG during the 1971-1974 license term;

(2) To determine whether the non-entertainment programming broadcast by Station KDIG was reasonably responsive to the community problems, needs and interests during the 1971-1974 license term;

(3) To determine the nature and extent of violations of the Commission's Rules and the terms of station authorization committed by West Coast Media, Inc. for which Official Notices of Violation were issued on September 27, 1974 and November 10, 1975; and whether in light of such violations, West Coast Media, Inc. has exercised that degree of responsibility required of a broadcast licensee.

(4) To determine, in light of the evidence adduced under the above issues, whether the applicant has the requisite qualifications to remain a Commission licensee, and whether a grant of the application would serve the public interest, convenience and necessity.

24. IT IS ALSO ORDERED, That, if it is determined that the record adduced pursuant to the above issues does

not warrant a denial of the above captioned renewal application, the Administrative Law Judge shall determine whether the record establishes that the licensee has willfully and repeatedly violated the Commission's Rules within one year previous to the issuance of this Notice of Apparent Liability as specified in Paragraph 17, *supra*, and whether pursuant to Section 503(b)(1)(A) and (B) of the Communications Act of 1934, as amended, a forfeiture of $10,000 or some lesser amount should be assessed.

25. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence under issues (1), (2) and (4) shall be upon West Coast Media, Inc., since information regarding KDIG's past programming is within licensee's knowledge; that the burden of proceeding with the introduction of evidence under Issue (3) shall be upon the Commission's Broadcast Bureau; and that the burden of proof with respect to all issues shall be on West Coast Media, Inc.

26. IT IS FURTHER ORDERED, That the petition to deny filed by Jonathan D. Lewis and John B. Musselman IS GRANTED to the extent indicated herein and IS DENIED in all other respects and that Jonathan D. Lewis and John B. Musselman are made parties to the hearing ordered herein.

27. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, West Coast Media, Inc., pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this Order.

28. IT IS FURTHER ORDERED, That West Coast Media, Inc., shall, pursuant to Section 311(a)(2) of the

Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing as required by Section 1.594(g) of the Rules.

29. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Memorandum Opinion and Order and Notice of Apparent Liability by Certified Mail—Return Receipt Requested, to West Coast Media, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX F

FCC 77M-1128
85812

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Docket No. 20971

File No. BRH-873

In re Application of
WEST COAST MEDIA, INC.

For Renewal of License of Station KDIG-FM
San Diego, California

MEMORANDUM OPINION AND ORDER

Issued June 22, 1977; Released: June 24, 1977

BY CHESTER F. NAUMOWICZ, JR., CHIEF ADMINISTRATIVE LAW JUDGE:

1. There is for consideration a Petition to Enlarge Issues filed by John B. Musselman and Jonathan D. Lewis on May 25, 1977 together with pleadings filed in response thereto. Petitioners argue that their pleading is timely because it is based on documents that only recently became available to them through discovery.

2. It is true that certain documents were unavailable to petitioners until quite recently. Hence, to the extent that such documents were necessary for seeking the relief now requested the subject pleading will be deemed to have been timely filed.

3. Petitioners first seek an issue as to whether the licensee's statement in its renewal application that the composite week was not representative of its past programming constitutes a misrepresentation. The request is based on petitioners' examination of logs which were produced during discovery. The issue will not be added.

The order of designation herein released November 5, 1976 reveals that the Commission was well aware of the nature of the licensee's programming during the bulk of the previous license period. It knew that the licensee had selected as "representative" a period toward the end of the license during which the amount of public service programming had been increased. Moreover, it stated these facts in the order of designation and examination of the logs upon which the facts are based adds nothing material to what was before the Commission when it designated the issues and made a reasoned decision not to include a misrepresentation issue.

4. Petitioners next seek a misrepresentation issue based upon the licensee's allegation that its alternate composite week was a representative week of June, 1974. Here also the order of designation indicates that the Commission was aware of the essential facts and elected not to include a misrepresentation issue. In light of that determination the presiding Judge will not now add an issue.

5. In its November 29, 1974 Opposition to Petition to Deny the licensee stated that it had reviewed all of the logs during the previous license period. However, during discovery in preparation for this hearing the licensee stated that the program logs from May 1971 through July 1972 were no longer available. From this petitioners infer that the licensee either misrepresented the fact that it had examined all the logs in 1974 or that it displayed a lack of candor by failing to advise the Commission that the logs were subsequently lost. While it does not follow that one or the other of petitioners' two alternatives must be true, either alternative is possible, and an issue will be added under which the matter may be explored.[1]

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[1] The record already contains evidence as to how and when the licensee first became aware that the logs were lost. Hence, no further evidence may be necessary, but each of the parties shall have the opportunity to decide whether and to what extent the record needs to be expanded.

6. Finally, petitioners point to a memo from the station's engineer which, in part, directed the remote control operators never to admit to an FCC inspector that they didn't know how to perform any given function, and allege that it constituted an order to the operators to be dishonest during inspections. No issue will be added. When the memo is read as a whole it is apparent that the Chief Engineer was merely directing the operators to consult posted instructions if they did not have any specific point in mind during inspection. A more invidious interpretation of the memo is possible only if a portion of it is read out of context, and there is no showing of a need to designate an issue permitting detailed exploration of the matter.

Accordingly, IT IS ORDERED that the subject petition IS GRANTED in part and IS OTHERWISE DENIED, and that the following issue, upon which the burdens of proof and proceeding shall be on the licensee, IS ADDED:

> "To determine the facts and circumstances surrounding the disappearance of the program logs of Station KDIG(FM) for the period May 1971-July 1972, and whether such facts and circumstances reflect adversely upon the qualification of West Coast Media, Inc. to be a licensee of the Commission."

IT IS FURTHER ORDERED, that a conference to establish procedures for hearing on the enlarged issue SHALL CONVENE on July 22, 1977 at 9:00 a.m. in the offices of the Commission at Washington, D.C.[2]

FEDERAL COMMUNICATIONS COMMISSION

/s/ Chester F. Naumowicz, Jr.
CHESTER F. NAUMOWICZ, JR.
Chief Administrative Law Judge

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[2] The presiding Judge is aware the counsel for both the licensee and petitioners are officed outside the city of Washington. Hence,

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it will not be necessary for those parties to attend the conference. Counsel for all parties are directed to confer informally on such matters as discovery, schedules, hearing dates and any other matters which should be disposed of at the conference. To the extent agreement is reached on these matters such agreement may be communicated to the presiding Judge at the conference through counsel for the Broadcast Bureau. To the extent agreement is impossible the parties can express their positions in the form of written communications, copies to all parties, upon which rulings will be made at the conference.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 81-1548

WEST COAST MEDIA, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

JOHN B. MUSSELMAN,
JONATHAN D. LEWIS,
Intervenors

[Filed Dec. 7, 1982]

Appeal from an Order of the
Federal Communications Commission

Before: MIKVA and GINSBURG, Circuit Judges and BAZELON, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the Federal Communications Commission, and was argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission under

review herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: December 7, 1982.

Opinion for the Court filed by Senior Circuit Judge Bazelon.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 81-1548

WEST COAST MEDIA, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

JOHN B. MUSSELMAN,
JONATHAN D. LEWIS,
Intervenors

[Filed Feb. 7, 1983]

Before: MIKVA and GINSBURG, Circuit Judges and BAZELON, Senior Circuit Judge

ORDER

On consideration of appellant's petition for rehearing, filed January 21, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX I

47 U.S.C. § 309 Application for license—
Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons thereof, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to par-

ticipate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

5 U.S.C. § 554

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

5 U.S.C. § 706

Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

15 U.S.C. § 80b-3(c), (e), (f)

Procedure for registration; filing of application; effective date of registration; amendment of registration

(c) (1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the application consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are

satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

Censure, denial, or suspension of registration; notice and hearing

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as in investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, or the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who com-

mits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

Bar or suspension from association with investment adviser; notice and hearing

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in

paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

15 U.S.C. § 78o

Manner of registration of brokers and dealers

(b) (1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of the filing of the application for registration. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this subsection.

(2) (A) An application for registration of a broker or dealer to be formed or organized may be made by a broker

or dealer to which the broker or dealer to be formed or organized is to be the successor. Such application, in such form as the Commission, by rule, may prescribe, shall contain such information and documents concerning the applicant, the successor, and any persons associated with the applicant or the successor, as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. The grant or denial of registration to such an applicant shall be in accordance with the procedures set forth in paragraph (1) of this subsection. If the Commission grants such registration, the registration shall terminate on the forty-fifth day after the effective date thereof, unless prior thereto the successor shall, in accordance with such rules and regulations as the Commission may prescribe, adopt the application for registration as its own.

(B) Any person who is a broker or dealer solely by reason of acting as a municipal securities dealer or municipal securities broker, who so acts through a separately identifiable department or division, and who so acted in such a manner on June 4, 1975, may, in accordance with such terms and conditions as the Commission, by rule, prescribes as necessary and appropriate in the public interest and for the protection of investors, register such separately identifiable department or division in accordance with this subsection. If any such department or division is so registered, the department or division and not such person himself shall be the broker or dealer for purposes of this chapter.

(C) Within six months of the date of the granting of registration to a broker or dealer, the Commission, or upon the authorization and direction of the Commission, a registered securities association or national securities exchange of which such broker or dealer is a member, shall conduct an inspection of the broker or dealer to determine whether it is operating in conformity with the provisions of this chapter and the rules and regulations

thereunder: *Provided, however,* That the Commission may delay such inspection of any class of brokers or dealers for a period not to exceed six months.

(3) Any provision of this chapter (other than section 78e of this title and subsection (a) of this section) which prohibits any act, practice, or course of business if the mails or any means or instrumentality of interstate commerce is used in connection therewith shall also prohibit any such act, practice, or course of business by any registered broker or dealer or any person acting on behalf of such broker or dealer, irrespective of any use of the mails or any means of instrumentality of interstate commerce in connection therewith.

(4) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated—

(A) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(B) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities; or

(iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(E) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the

Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E) no person shall be deemed to have failed reasonably to supervise any other person, if—

(i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(F) is subject to an order of the Commission entered pursuant to paragraph (6) of this subsection (b) barring or suspending the right of such person to be associated with a broker or dealer.

(5) Pending final determination whether any registration under this subsection shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing, to be necessary or appropriate in the public interest or for the protection of investors. Any registered broker or dealer may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered broker or dealer is no

longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer.

(6) The Commission, by order, shall censure or place limitations on the activities or functions of any person associated, or seeking to become associated, with a broker or dealer, or suspend for a period not exceeding twelve months or bar any such person from being associated with a broker or dealer, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in subparagraph (A), (D), or (E) of paragraph (4) of this subsection, has been convicted of any offense specified in subparagraph (B) of said paragraph (4) within ten years of the commencement of the proceedings under this paragraph, or is enjoined from any action, conduct, or practice specified in subparagraph (C) of said paragraph (4). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with a broker or dealer is in effect willfully to become, or to be, associated with a broker or dealer without the consent of the Commission, and it shall be unlawful for any broker or dealer to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such broker or dealer knew, or in the exercise of reasonable care should have known, of such order.

(7) No registered broker or dealer shall effect any transaction in, or induce the purchase or sale of, any security unless such broker or dealer meets such standards of operational capability and such broker or dealer and all natural persons associated with such broker or dealer meet such standards of training, experience, competence, and such other qualifications as the Commission finds necessary or appropriate in the public interest or

for the protection of investors. The Commission shall establish such standards by rules and regulations, which may—

(A) specify that all or any portion of such standards shall be applicable to any class of brokers and dealers and persons associated with brokers and dealers;

(B) require persons in any such class to pass tests prescribed in accordance with such rules and regulations, which tests shall, with respect to any class of partners, officers, or supervisory employees (which latter term may be defined by the Commission's rules and regulations and as so defined shall include branch managers of brokers or dealers) engaged in the management of the broker or dealer, include questions relating to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matters; and

(C) provide that persons in any such class other than brokers and dealers and partners, officers, and supervisory employees of brokers or dealers, may be qualified solely on the basis of compliance with such standards of training and such other qualifications as the Commission finds appropriate.

The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this paragraph, including, but not limited to, fees for any test administered by it or under its direction. The Commission may cooperate with registered securities associations and national securities exchanges in devising and administering tests and may require registered brokers and dealers and persons associated with such brokers and dealers to pass tests administered by or on behalf of any such association or exchange and to pay such association or exchange reasonable fees or charges to

defray the costs incurred by such association or exchange in administering such tests.

(8) In addition to the fees and charges authorized by paragraph (7) of this subsection, each registered broker or dealer not a member of a registered securities association shall pay to the Commission such reasonable fees and charges as may be necessary to defray the costs of the additional regulatory duties required to be performed by the Commission because such broker or dealer effects transactions in securities otherwise than on a national securities exchange of which it is a member and is not a member of a registered securities association. The Commission, by rule, shall establish such fees and charges.

(9) No broker or dealer subject to paragraph (8) of this subsection shall effect any transaction in, or induce the purchase or sale of, any security (otherwise than on a national securities exchange of which it is a member) in contravention of such rules and regulations as the Commission may prescribe designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

(10) For the purposes of determining whether a person is subject to a statutory disqualification under section 78f(c)(2), 78*o*-3(g)(2), or 78q-1(b)(4)(B) of this title, the term "Commission" in paragraph (4)(B) of this title, the term "Commission" in paragraph (4)(B) of this subsection shall mean "exchange", "association", or "clearing agency", respectively.

15 U.S.C. § 80a-9(b)

Certain persons serving investment companies; administrative action of Commission

The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person—

(1) has willfully made or caused to be made in any registration statement, application or report filed with the Commission under this subchapter any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such registration statement, application, or report any material fact which was required to be stated therein; or

(2) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of subchapter II of this chapter, or of this subchapter, or of any rule or regulation under any of such statutes; or

(3) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of subchapter II of this chapter, or of this subchapter, or of any rule or regulation under any of such statutes.

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No. 82-1823

In the Supreme Court of the United States

OCTOBER TERM, 1982

WEST COAST MEDIA, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission properly denied a renewal application for a radio station because the licensee failed to make reasonable and good faith efforts to broadcast non-entertainment programming and because its programming was not responsive to the needs and interests of the listening community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 695 F.2d 617. The decision of the Federal Communications Commission (Pet. App. 46a-68a) is reported at 79 F.C.C.2d 610. The opinion and order of the Commission denying reconsideration (Pet. App. 69a-79a) is reported at 86 F.C.C.2d 331. The initial decision of the administrative law judge (Pet. App. 13a-45a) is reported at 79 F.C.C.2d 625.

JURISDICTION

The judgment of the court of appeals (Pet. App. 101a-102a) was entered on December 7, 1982. A petition for rehearing was denied on February 7, 1983 (Pet. App. 103a). The petition for a writ of certiorari was filed on May 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an Ohio corporation created by a group of businessmen with no prior experience in broadcasting for the purpose of acquiring FM radio stations in California. In May 1971, petitioner purchased radio station KDIG-FM, in San Diego, California (Pet. App. 15a-16a).[1] In December 1971, petitioner amended its renewal application for KDIG, which was then pending before the Commission. Citing financial losses as the reason for its amended application, petitioner proposed eliminating all news and other non-entertainment programming, except public affairs. Petitioner promised to devote at least 1.1% of its broadcast time to public affairs and further promised expressly that this programming would not be pre-produced tapes, but instead would consist of three, 5-minute programs per day, seven days a week, which would involve local investigation and behind-the-scenes reporting (*id.* at 48a & n.4).

On July 25, 1972, the Commission accepted the amended proposal (Pet. App. 58a n.25).[2] Beginning the next month, however, and continuing through April 1974—a period of more than one-half of the license term and ending just three months before the next renewal application was due to be filed—KDIG broadcast no public service programming whatever (*id.* at 57a).

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[1]During the relevant time period, petitioner was also the licensee of radio station KORJ in Orange, California (Pet. App. 15a).

[2]The Commission's staff in its letter to petitioner added that it expected KDIG to broadcast increased programs during the license term " 'consistent with [petitioner's] proposal' " (Pet. App. 49a). In this regard, the December 1971 amendment had stated further that it was petitioner's intention " 'well before the next license renewal time' " at both of its stations to devote " 'more than just an adequate or minimum of time to news, public affairs, religious and instructional types of programs * * *' " (*id.* at 48a; footnote omitted).

2. Petitioner filed an application for renewal of its KDIG license in July 1974 (Pet. App. 80a). On November 1, 1974, two residents of San Diego filed a petition to deny the application, largely on the ground that petitioner had failed to perform as it had promised in its 1971 renewal application (*id.* at 80a, 82a). The Commission set the renewal application for hearing on the following four issues: whether petitioner reasonably attempted to perform as promised with respect to its non-entertainment programming; whether its non-entertainment programming was responsive to the community's needs or interests; whether petitioner had violated the Commission's rules; and whether renewal of petitioner's license would serve the public interest (*id.* at 94a).

After a hearing, the administrative law judge ("ALJ") concluded that petitioner had "failed to operate fully in the public interest during the 1971-1974 license period" (Pet. App. 42a). The ALJ found that, contrary to its promise in 1971, petitioner had broadcast little or no news or public affairs during the bulk of the license period (*id.* at 24a-25a).[3] He also rejected petitioner's assertion that its programming deficiency should be excused because of financial difficulties. The ALJ pointed out that petitioner had failed to keep separate records regarding KDIG and therefore it was impossible to determine whether KDIG alone was responsible for the financial problems (*id.* at 25a). The ALJ also found that petitioner had been oblivious to the community's programming interests or needs and that petitioner had

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[3]The ALJ noted that it was impossible to make precise findings regarding petitioner's broadcast performance because the program logs for over one year had been misplaced and the logs for the rest of the period were often unreliable (Pet. App. 35a-36a). The ALJ held that although petitioner did have an obligation to keep accurate records, no independent decisional significance would be attached to petitioner's loss of the logs (*id.* at 41a-42a). The ALJ noted, however, that the absence of the logs weakened petitioner's submission with respect to its past performance.

committed a number of minor violations of the Commission's rules (*id.* at 26a-34a). Although the ALJ found that petitioner had not satisfied its obligation to perform in the public interest, he granted a one-year renewal because he concluded that the inadequate performance had been largely the product of petitioner's lack of broadcast experience and not a deliberate effort to avoid performing as promised (*id.* at 42a-43a).

3. The Commission adopted most of the ALJ's findings (Pet. App. 53a). It found a substantial discrepancy between petitioner's programming promises and its performance (*id.* at 57a). The Commission also found that petitioner failed to make a good faith effort to comply with its promises; petitioner had cut back staff and resources at KDIG so as to make compliance impossible (*id.* at 58a).[4] The Commission concluded that petitioner "made initial proposals * * * [that] it did not then intend to effect [and] that with the passage of time [petitioner] did not make sincere efforts to carry out its proposals" (*id.* at 64a).

The Commission also rejected petitioner's claim that its failure to perform as promised should be excused by the station's financial difficulties, finding that the evidence presented by petitioner supported an inference of "misallocation of resources, rather than a lack thereof" (Pet. App.

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[4]The Commission found further evidence of the licensee's lack of reasonable and good faith efforts to fulfill its commitments in the testimony of Donald McCann, a major investor in petitioner, to the effect that it was his initial intent to reduce KDIG's staff to one employee whose duties would include selling, programming the automation machines each day, servicing the background music, supervising the telephone service bureau and composing one news-public affairs program per day. The Commission concluded that this employee could not reasonably have been expected to have had the time to produce the daily 5-minute public affairs program that the licensee promised the Commission in December 1971 (Pet. App. 59a).

64a).[5] The Commission pointed out that "[t]he citizens of San Diego were ill-served by the deprivation of all public service programming while [petitioner] was devoting its resources and efforts to improving the market position of [its other radio station]" (*ibid.*). Finally, the Commission found that petitioner's lack of non-entertainment programming was also a dereliction of its duty to be responsive to the needs and interests of the community (*id.* at 66a).

Based on these adverse findings, the Commission rejected the ALJ's decision to grant petitioner a one-year renewal of its license. The Commission found that lack of experience was an inadequate excuse for petitioner's failure to attempt in good faith to comply with its broadcasting promises during virtually the entire period of its prior license (Pet. App. 64a). Accordingly, the Commission denied petitioner's application for renewal (*id.* at 68a).

On petition for reconsideration, the Commission rejected petitioner's claim that non-renewal had been improperly predicated on findings of misrepresentation, which had not been designated as an issue in the case. The Commission pointed out first that petitioner's good faith in attempting to comply with its broadcasting promises was set as an issue for hearing and thus petitioner should have been on notice that its general intentions with regard to the station would be an issue (Pet. App. 72a-78a). The Commission also made clear that its decision was based on petitioner's inadequate performance and not on any misrepresentations petitioner may have made (*id.* at 74a).

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[5]Noting that petitioner's financial showing commingled the revenues and expenses for both of its stations, the Commission pointed to the need for a "station-specific" showing particularly where, as in this case, there was evidence indicating a disparity in petitioner's allocation of resources in favor of its other station at the expense of KDIG (Pet. App. 62a-63a).

4. The court of appeals affirmed (Pet. App. 1a-12a). The court characterized as "imprudent" the Commission's reference to petitioner's intent in making its proposals, but found the matter harmless—no more than the logical conclusion to be derived from the "[w]ide discrepancies [that] existed between [petitioner's] proposals and its performance from the outset" (*id.* at 6a; footnote omitted). In addition, the court found it unnecessary to remand on this issue since the Commission on reconsideration had already made plain that its decision not to renew petitioner's license was based on performance and not on misrepresentations (*id.* at 7a). The court also held that the Commission's rejection of petitioner's financial hardship defense and its refusal to grant renewal were fully explained and consistent with the statutory public interest standard that the FCC is obliged to apply, 47 U.S.C. 309 (Pet. App. at 8a-11a). Finally, the court held that the Commission's finding that petitioner had failed to make a good faith effort to comply with its broadcasting promises was supported by substantial evidence (*id.* at 11a-12a).

ARGUMENT

1. Petitioner argues (Pet. 8-11) that the Commission failed to explain adequately why it denied the renewal application in this case since it had not previously denied a license renewal application solely because the licensee had failed to perform as promised.[6] The Commission, however,

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[6]Petitioner inaccurately characterizes (Pet. 3, 8-9) the Commission's decision as based exclusively on the issue of promise-versus-performance. The Commission also found that petitioner had failed completely in its non-entertainment programming to be responsive to the community's problems, needs and interests. Although the issues are intertwined, they involve distinct obligations imposed upon a licensee. The Commission did not reach the question whether its adverse conclusion on the responsiveness issue was, irrespective of the other issues in the case, an independent basis for denying renewal, but it did indicate that its decision rested on its conclusion that "[petitioner] failed to meet its burden of proof on *both* the promise versus performance *and* programming responsiveness issues" (Pet. App. 75a n.17; emphasis added).

fully explained its conclusion that renewal of petitioner's license was not in the "public interest"; this is all that was required. "[T]he Commission is [not] bound * * * to deal with all cases at all times as it has dealt with some that seem comparable." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946).

Petitioner's contention amounts to a claim that its license should be renewed, despite its egregious failure to honor its broadcasting promises, because it was not accused of affirmative misconduct. But the rule has long been that the incumbent licensee "must literally 'run on his record' " (*Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966)), and if performance is wanting, as it clearly was here, then "[t]he licensee, having been given a chance and having failed, should be through." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 (D.C. Cir. 1971). These are the settled principles that the Commission applied in this case, and the court of appeals correctly held that they were properly applied to bar renewal of petitioner's license.

2. Petitioner argues (Pet. 11-14) that the decision below conflicts with the decision of the Fifth Circuit in *Steadman* v. *SEC*, 603 F.2d 1126, 1143 (1979), aff'd on other grounds, 450 U.S. 91 (1981), because the court here allowed the FCC to impose the "ultimate sanction"—nonrenewal of a license—without an explanation for why a lesser "sanction" would not suffice (Pet. 11-12), whereas the Fifth Circuit in *Steadman* remanded to the SEC for an explanation of why it had permanently barred an investment broker from practicing his trade. There is no conflict between the decisions.

The court of appeals explained (Pet. App. 10a) that the FCC's role in license renewals is not punitive and thus is readily distinguishable from the SEC's "debarment" function. In *Steadman*, one of the primary justifications offered

by the SEC for the severity of its sanction was to deter *other* brokers from engaging in such conduct. The court asked the SEC to explain why lesser sanctions would not equally well serve that deterrent purpose. 603 F.2d at 1142. Thus, the reason for the remand in *Steadman* is completely irrelevant to the bases for the Commission's decision in this case.

Moreover, the FCC fully explained why no lesser "sanction" was appropriate in this case; any lesser sanction would have allowed petitioner to continue broadcasting on KDIG. In light of petitioner's past performance and the Commission's finding that that performance was a reasonable basis for predicting what petitioner would do in the future (Pet. App. 65a), the Commission found that petitioner's continued operation would not be in the public interest. This finding fully supports the Commission's determination to deny even short term renewal of the license.

3. Finally, petitioner asserts (Pet. 14-18) once again that its renewal was denied because the Commission found it guilty of misrepresentation, even though that was not a designated issue. The Commission, however, expressly disavowed resting its decision on findings of misrepresentation (Pet. App. 74a, 75a n.17). The court of appeals accepted the Commission's explanation and correctly concluded that a remand would serve no purpose (*id.* at 7a). Petitioner had notice and a full opportunity to be heard on the dispositive issues, and, as the court below found, the Commission's grounds were sufficient to support its result. Accordingly, further review of this claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission

JUNE 1983

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